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RECORD, CASE No. 13,811.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 211.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY GOODRIDGE AND HIRAM MARFEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 18, 1889.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 19th day of January, A. D. 1888, came Henry Goodridge and Hiram Marfell, by Messrs. Sampson & Millett, their attorneys, and filed in said court their complaint and sued out of and under the seal of said court a writ of summons against the Union Pacific Railway Company, and the said complaint is in words and figures as follows, to wit:

Complaint.

In the United States Circuit Court, District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs,
against
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Complaint.

The plaintiffs, Henry Goodridge and Hiram Marfell, complain- of the defendant, "The Union Pacific Railway Co.," allege—

That they are citizens of the State of Colorado, and that the defendant is and was at the times herein mentioned a common carrier and a corporation organized and existing under the acts of Congress of the United States.

2 That the amount in dispute in this suit exceeds the sum or value of two thousand dollars.

For a first count and cause of action they aver that at the times of the commission of the grievances on the part of said defendant hereonafter complained of it (the defendant) was operating a line of railroad, with locomotives, cars, and necessary rolling stock thereto attached, as owner or lessee between the following points and the city of Denver, State of Colorado, and located within the limits of said State, to wit, the town- of Erie and Marshall, which town- were and are situated at or near the same locality in said State, on the said line of said railroad, at a distance of thirty-five miles or thereabouts from said city of Denver; that if there is or was at said times any difference in distance from the said city of Denver between and from said towns of Erie and Marshall said difference was then and is in favor of said town of Erie of nearly two miles less in distance therefrom than the said town of Marshall; that the defendant at such times published the same schedule and classification of freight rates for shipping coal from said towns to said city of Denver, which was at the rate of one dollar per ton for such service.

That plaintiffs are and were at said times copartners as coal merchants and dealers, carrying on their said business at the said town of Erie and city of Denver under the firm name and style of Goodridge and Marfell.

That they are and were at said times owners of, working, and operating certain coal mines at the said town of Erie; that plain-

tiffs, between the 31st day of October, 1885, and the 12th day
3 of August, 1887, shipped in the cars of said defendant over the said line of railroad from the said town of Erie to the city of Denver twelve thousand nine hundred and sixty and sixteen hundred sixty-five twenty-hundredths tons of coal belonging to them, for which the defendant then *in* their charge- plaintiffs and received from them as freight for such shipment of said coal twelve thousand nine hundred and sixty and $\frac{1665}{2000}$ dollars, being at the rate of one dollar per ton for each ton of said coal so shipped between said points during said period. Plaintiffs, then and there believing that such price was the regular schedule rate charged the general public and all parties similarly situated for such service, paid the same; that defendant during said period published as aforesaid its said regular schedule rates for the shipment of coal by car-load lots between and from said towns of Erie and Marshall to said city of Denver, making no difference or discrimination whatever in rates for such service between and from said points (Erie and Marshall) to Denver; that the Marshall Consolidated Coal Mining Company, a Colorado company or corporation, during said period worked and operated coal mines at the said town of Marshall, and was engaged in shipping coal by car-load lots over defendant's said line of railroad from its said mines, located at the said town of Marshall, to the city of Denver under the same circumstances which plaintiffs shipped their coal from Erie to Denver as aforesaid except as to rates or charges; that the said company was engaged in the coal business under substantially the same circumstances at the said city of Denver as the plaintiffs were engaged therein, as hereinbefore alleged, and was then and there a competitor with the plaintiffs in the line of such business; that the amount of such shipments were, as near as plaintiffs can state, one hundred forty-five thousand eight hundred thirty-three tons; that the defend-
4 ant charged and received from said Marshall Coal Company as freight for said shipments of its said coal the price of sixty cents per ton for each ton of coal so as aforesaid shipped for it during said time; that the defendant then and there allowed and paid said company a rebate of forty cents per ton on each — of its coal so as aforesaid shipped by it from the same schedule rates of one dollar per ton for such service; that plaintiffs are informed and believe that such rebates which were so allowed and paid said company amounted to upwards of fifty-eight thousand dollars; that said defendant in the manner and at the times aforesaid, without the written or any approval whatever of the railroad commissioner of the State of Colorado, did charge, demand, and receive from plaintiffs for the transportation of their coal as above set forth a greater sum, to wit, the sum of five thousand one hundred and eighty-four and $\frac{80}{100}$ dollars ($5,184.80), while operating under the classification and schedule in force as aforesaid than it charged, demanded, and received from said Marshall Consolidated Coal Mining Company for like service, upon like conditions and under similar circumstances, in the manner, and to the extent above mentioned without the knowledge or consent of plaintiffs; that the defendant, in manner

and to the extent above alleged, made concessions of rates, allowed said "Marshall Consolidated Coal Mining Company" drawbacks, and made special contracts with said company for shipping and carrying its said coal, which were not open to and allowed all persons, companies, or corporations, including plaintiffs, alike at the same rate per ton per mile upon like conditions and under similar circumstances, without obtaining the approval of said railroad commissioner in writing or otherwise.

5 The plaintiffs allege on information and belief that the defendant at the said times allowed and granted other party or parties to them unknown, similarly situated to them in said business, the same rebates, concessions, and special rates for the carrying and shipment of their coal over defendant's said line of road from said towns of Marshall and other places located thereon to the said city of Denver under like conditions and similar circumstances; that such rebates, concessions, and special rates were allowed and granted to the said Marshall Consolidated Coal Mining Company, as above detailed; that the labor and expense performed and sustained by the defendant in handling and shipping plaintiff's coal, as above alleged, was less in value than the handling and shipping the said Marshall Consolidated Coal Mining Company's said coal and all the said parties' coal as aforesaid; that all the coal referred to in this complaint was about the same quality and cost the defendant the same price to handle and ship the same over its said line under similar conditions and like circumstances, and for any overcharges, concessions, and rebates under such conditions and circumstances the defendant was liable to the parties damaged in triple damages under the laws of Colorado; that such charges to plaintiffs for such transportation services were and are unreasonable, unjust, and extortionate; that all such overcharges, discriminations, rebates, concessions, and extortions were made, practiced, and allowed by defendant without the sanction or approval of said railroad commissioner in any manner whatsoever; that on or about the 12th day of August, 1887, at the said city of Denver, before this action, the plaintiffs duly demanded of the defendant that it repay them said overcharges of five thousand one hundred eighty-four $\frac{30}{100}$ dollars; that de-

6 fendant then and there refused and still refuse to pay the said sum or any part thereof; that the defendant then and there denied all liability whatever to plaintiffs concerning the claims and grievances of plaintiffs aforesaid and peremptorily refused, though requested, to settle and adjust the same in any manner whatever; that the delay of defendant in neglecting and refusing to repay plaintiffs said sum of $5,184.30 has been ever since said date and is unreasonable and vexatious.

For the second count and cause of action the plaintiffs allege that at the time of the defendant's commission of the grievances herein alleged it was operating a line of railroad, with rolling stock, locomotives, and cars thereto attached, as owner or lessee between the following points and the city of Denver, State of Colorado, situated within the limits of said State, to wit, the towns of Erie and Marshall, which were and are situated at or near the same locality in

said State, on the said line of railroad, at a distance of thirty-five miles or thereabouts from said city of Denver; that if there is or was at said times any difference in distance from the said city of Denver between and from said towns of Erie and Marshall said difference was then and is in favor of said town of Erie of nearly two miles less in distance therefrom than the said town of Marshall; that the defendant at such times published the same schedule and classification of freight rates for shipping coal from said towns to said city of Denver, which was at the rate of one dollar per ton for such service; that plaintiffs are and were at said times copartners as coal merchants and dealers, carrying on their said business at the said town of Erie and city of Denver under the firm name and style of Goodridge and Marfell; that they are and were at
7 said times owners of, working, and operating certain coal mines at the said town of Erie; that plaintiffs between the 31st day of October, 1885, and the 12th day of August, 1887, shipped in the cars of said defendant over the said line of railroad from the said town of Erie to the said city of Denver twelve thousand nine hundred and sixty and $\frac{1665}{2000}$ tons of coal belonging to them, for which the defendant then and there charged plaintiffs and received from them as freight for such shipment of said coal twelve thousand nine hundred and sixty and $\frac{1665}{2000}$ dollars, being at the rate of one dollar per ton for each ton of said coal so shipped between said points during said period; plaintiffs, then and there believing that such price was the regular schedule rate charged the general public and all parties similarly situated for such service, paid the same; that defendant during said period published as aforesaid its said regular schedule rates for the shipment of coal by car-load lots between and from said town- of Erie and Marshall to said city of Denver, making no difference or discrimination whatever in rates for such service between and from said points (Erie and Marshall) to Denver; that the Marshall Consolidated Coal Mining Company, a Colorado company or corporation, during said period worked and operated coal mines at the said town of Marshall and was engaged in shipping coal by car-load lots over defendant's said line of railroad from its said mines, at the said town of Marshall, to the city of Denver under the same circumstances which plaintiffs shipped their coal from Erie to Denver as aforesaid except as to rates or overcharges; that the said company was then engaged in the coal business under substantially the same circumstances at the said city of Denver as the plaintiffs were engaged therein, as hereinbefore alleged, and was then and there a competi-
8 tor with the plaintiffs in the line of such business; that the amount of such shipments were, as near as plaintiffs can state, one hundred and forty-five thousand eight hundred and thirty-three tons; that the defendant charged and received from said Marshall Consolidated Coal Mining Company as freight for said shipments of it- said coal the price of sixty cents per ton for each ton of coal so as aforesaid shipped for it during said time; that the defendant then and there allowed and paid said company a rebate of forty cents per ton on each ton of its coal so as aforesaid shipped

by it from the same schedule rates of one dollar per ton for such service; that plaintiffs are informed and believe that such rebates which were so allowed and paid said company amounted to upwards of fifty-eight thousand dollars; that said defendant in the manner and at the times aforesaid, without the written or any approval whatever of the railroad commissioner of the State of Colorado, did charge, demand, and receive from plaintiffs for the transportation of their coal as above set forth a greater sum, to wit, the sum of five thousand one hundred eighty-four $\frac{30}{100}$ dollars, while operating under the classification and schedule in force as aforesaid that it charged, demanded, and received from said Marshall Consolidated Coal Mining Company for like service, upon like conditions and under similar circumstances, in the manner, and to the extent abovementioned without the knowledge or consent of plaintiffs; that the defendant, in manner and to the extent above alleged, made concessions of rates, allowed said Marshall Consolidated Coal Mining Company drawbacks, and made special contracts with said company for shipping and carrying its said coal, which were not open to and allowed all persons, companies, or corporations, including plain-
9 tiffs, alike at the same rate per ton per mile upon like conditions and under similar circumstances, without obtaining the approval of said railroad commissioner in writing or otherwise; the plaintiffs allege on information and belief that the defendant at the said times allowed and granted other party or parties to them unknown, similarly situated to them in said business, the same rebates, concessions, and special rates for the carrying and shipment of their coal over defendant's said line of railroad from said town of Marshall and others located thereon to the said city of Denver under like conditions and similar circumstances; that such rebates, concessions, and special rates were allowed and granted to the said Marshall Consolidated Coal Mining Company, as above detailed; that the labor and expense performed and sustained by the defendant in handling and shipping plaintiff's coal, as above alleged, was less in value than the handling and shipping the said Marshall Consolidated Coal Mining Company's said coal and all the said parties' coal as aforesaid; that all the coal referred to in this complaint was about the same quality and cost the defendant the same price to handle and ship the same over its said line under similar conditions and like circumstances, and for any overcharges, concessions, and rebates under such conditions and circumstances —; that such charges to plaintiffs for such transportation service were and are unreasonable, unjust, and extortionate; that all such overcharges, discriminations, rebates, concessions, and extortions were made, practiced, and allowed by defendant without the sanction or approval of said railroad commissioner in any manner whatsoever; that on or about the 12th day of August, 1887, at the said city of Denver, before this action, the plaintiffs duly demanded of the defend-
10 ant that it repay them said overcharges of five thousand one hundred and eighty-four $\frac{30}{100}$ dollars; that defendant then and there refused and still refuses to pay the said sum or any part thereof; that the defendant then and there denied all liability what-

ever to plaintiffs concerning the claims and grievances of plaintiffs aforesaid and peremptorily refused, though requested, to settle and adjust the same in any way whatever; that the delay of defendant in neglecting and refusing to repay plaintiffs said sum of $5,184.30 has been ever since said date and is unreasonable and vexatious.

For a third count and cause of action the plaintiffs alleges that they are and were at the times herein referred to copartners doing business under the firm name and style of Goodrich and Marfell. They complain of "the Union Pacific Railway Company" for that the said defendant, on the 12th day of August, 1887, was indebted to the said plaintiffs in the sum of five thousand one hundred and eighty-four $\frac{30}{100}$ dollars for so much money by said defendant before that time had and received to and for the use of the said plaintiffs, and which said sum of money the said plaintiffs aver was then due and payable; yet the said defendant, though often requested, has not paid said sum of money or any part thereof; wherefore by reason of said premises the defendant is indebted to plaintiffs for the said sum of five thousand one hundred and eighty-four and $\frac{30}{100}$ dollars, with interest thereon from the 12th day of August, 1887, at the rate of ten per cent. per annum.

Wherefore plaintiffs ask judgment against said defendant on the said first count for fifteen thousand five hundred fifty-two and $\frac{90}{100}$ dollars ($15,552.90), with interest from the 12th day of August, 1887, at the rate of ten per cent. per annum; also a reasonable
11 attorney's fee to be fixed by the court, and costs; on the 2nd and 3rd counts they ask judgment for the sum of five thousand one hundred and eighty-four and $\frac{30}{100}$ dollars ($5,184.30), with interest thereon from the 12th day of August, 1887, at the rate of ten per cent. — annum and costs of this action.

SAMPSON & MILLETT,
Attorneys for Plaintiffs.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Henry Goodridge, being duly sworn, deposes and says:

1. I am one of the plaintiffs above named, duly authorized to make this affidavit.

2. I have heard read the foregoing complaint and know the contents thereof; that the same is true of my own knowledge except those matters therein stated on information and belief, and as to those matters I believe it to be true.

HENRY GOODRIDGE.

STATE OF COLORADO, } ss:
Arapahoe County, }

Subscribed and sworn to before me this 19th day of January, A. D. 1888.

CHARLES H. CASTNER,
[SEAL.] *Notary Public.*

My commission expires April 13th, 1891.

12 (Indorsed:) No. 2237. In the U. S. cir. court, Colorado. Henry Goodridge *et al. vs.* U. P. R. R. Co. Complaint. Filed Jan. 19, 1888. William A. Willard, clerk. Sampson & Millett.

And the said summons and proof of service thereof is in words and figures as follows, to wit:

Summons and Proof of Service.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, *District of Colorado*, } *ss.:*

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs, *versus* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Complaint Filed in the Clerk's Office this 19th Day of January, A. D. 1888.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You are hereby notified that an action has been brought in said court by Henry Goodridge and Hiram Marfell, plaintiffs, against you as defendant to recover the sum of $20,737.20, due from you, the said defendants, to the said plaintiff- as damages and overcharges for hauling coal for plaintiffs from Erie, in the State of
13 Colorado, to Denver, in said State, as more fully set forth and described in the complaint filed herein and to which reference is here made, together with interest on said sum from August 12th, 1887, at 10% per annum and for the costs of this suit.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise with- forty days from the day of service; and if you fail so to do the said plaintiff- will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of
[SEAL.] the said circuit court, at the city of Denver, in said district, this 19th day of January, A. D. 1888, and of the Independence of the United States the 112 year.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, *Jan'y 26th, A. D.* 1888.

I hereby certify that I received the within writ on the — day of ——, A. D. 1888, and that I have personally served the same
14 upon the said defendant, The Union Pacific R'y Co., by delivering to Joseph K. Choate, the superintendent of defendant company, personally, a true copy of the within writ at the time and place as follows: At Denver, county of Arapahoe, on the 25th day of January, A. D. 1888.

This writ therefore returned executed as the law directs this 26th day of January, A. D. 1888.

ZEPH. T. HILL, *Marshal,*
By E. C. CURRIER,
Deputy Marshal.

Marshal's Fees.

Service, 1 defendant's at $2	$2 00
Mileage, 2 miles at 6c., going only	12
Total	$2 12

Paid by plaintiff-.

(Indorsed:) Gen. No., 2237. Circuit court of the United States for the district of Colorado. Henry Goodridge *et al.*, plaintiffs, *versus* The Union Pacific R'y Co., defendants. Summons. Filed this 26 day of Jan'y, A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Sampson & Millett, of Denver, attorney- for plaintiff-. Received Jan. 19, 1888. U. S. marshal's office, district Colorado.

And afterwards and on, to wit, the 12th day of May, A. D. 1888, the same being one of the regular juridical days of the May term, A. D. 1888, of said court—present, the Honorable David J. Brewer, circuit judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

15 *Order: Demurrer to Complaint Sustained; Leave to Amend.*

HENRY GOODRIDGE and HIRAM MARFELL *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 2237. Action for Damages.

At this day come the said plaintiffs, by Byron Millett, Esq., their attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the demurrer of the said defendant to the complainant herein

having heretofore come on to be heard and having been argued by counsel and the court now being sufficiently advised in the premises, it seemeth to the court now here that the first count of the said complaint is not sufficient in law, and that the second and third counts of the said complaint are sufficient in law, and so as to the said first count the said demurrer is sustained and as to the second and third counts of the said complainant the said demurrer is overruled.

And thereupon, on motion of the said plaintiff, it is ordered by the court that he have leave to amend the first count of the complaint within five days from this day as he shall be advised.

And thereupon, on motion of the said plaintiff-, it is ordered by the court that the said defendant answer herein within fifteen days from this day.

And afterwards and on, to wit, the 15th day of May, A. D. 1888, came again the said plaintiffs, by their attorneys aforesaid,
16 and filed in said court and in said cause an amended complaint against the said defendant, and the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

In the United States Circuit Court, District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs,
against
THE UNION PACIFIC RAILWAY COMPANY, Defendant.
} No. 2237. (Law.)

Amended complaint on the first count or cause of action.

The plaintiffs, Henry Goodridge and Hiram Marfell, complain of the defendant, "The Union Pacific Railway Co.," allege—

That they are citizens of the State of Colorado, and that the defendant is and was at the times herein mentioned a common carrier and a corporation organized and existing under the acts of Congress of the United States.

That the amount in dispute in this suit exceeds the sum or value of two thousand dollars.

For an amended first count and cause of action they aver that at the times of the commission of the grievances on the part of said defendant, hereinafter complained of, it (the defendant) was operating a line of railroad, with locomotives, cars, and necessary
17 rolling stock thereto attached, as owner or lessee, between the following points and the city of Denver, State of Colorado, and located within the limits of said State, to wit, the towns of Erie and Marshall, towns which were and are situated at or near the same locality, in said State, on the said line of said railroad, at a distance of thirty-five miles or thereabouts from said city of Denver; that if there is or was at said times any difference in distance from

the said city of Denver, between and from said towns of Erie and Marshall, said difference was then and is in favor of said town of Erie, of nearly two miles less in distance therefrom than the said town of Marshall; that the defendant at such times published the same schedule and classification of freight rates for shipping coal from said towns to said city of Denver, which was at the rate of one dollar per ton for such service.

That plaintiffs are and were at said times copartners as coal merchants and dealers, carrying on their said business at the said town of Erie and city of Denver, under the firm name and style of Goodridge and Marfell.

That they are and were at said times owners of, working, and operating certain coal mines at the said town of Erie; that plaintiffs between the 31st day of October, 1885, and the 12th day of August, 1887, shipped in the cars of said defendant over the said line of railroad, from the said town of Erie to the said city of Denver, twelve thousand nine hundred and sixty and sixteen hundred sixty-five twenty hundredths tons of coal belonging to them, for which the defendant then and there charged plaintiffs and received from them as freight for such shipments of said coal twelve thousand nine hundred and sixty and $\frac{1665}{2000}$ dollars, being at the rate of
18 one dollar per ton for each ton of said coal so shipped between said points during said period; plaintiffs, then and there believing that such price was the regular schedule rate charged the general public and all parties similarly situated for such service, paid the same; that defendant during said period published as aforesaid its said regular schedule rates for the shipment of coal by car-load lots between and from said towns of Erie and Marshall to said city of Denver, making no difference or discrimination whatever in rates for such service between and from said points (Erie and Marshall) to Denver; that the Marshall Consolidated Coal Mining Company, a Colorado company or corporation, during said period worked and operated coal mines at the said town of Marshall and was engaged in shipping coal by car-load lots over defendant's said line of railroad from its said mines located at the said town of Marshall to the city of Denver under the same circumstances which plaintiffs shipped their coal from Erie to Denver as aforesaid, except as to rates or charges; that the said company was engaged in the coal business under substantially the same circumstances at the said city of Denver as the plaintiffs were engaged therein, as hereinbefore alleged, and was then and there a competitor with the plaintiffs in the line of such business; that the amount of such shipments *were*, as near as plaintiffs can state, one hundred forty-five thousand eight hundred thirty-three tons; that the defendant charged and received from said Marshall Coal Company as freight for said shipments of its said coal the price of sixty cents per ton for each ton of coal so as aforesaid shipped for it during said time; that the defendant then and there allowed and paid said company a rebate of forty cents per ton on each ton of its coal so as aforesaid shipped
19 by it from the same schedule rates of one dollar per ton for such service; that plaintiffs are informed and believe that

such rebates which were so allowed and paid said company amount to upwards of fifty-eight thousand dollars; that said defendant in the manner and at the times aforesaid, without the written or any approval whatever of the railroad commissioner of the State of Colorado, did charge, demand, and receive from plaintiffs for the transportation of their coal as above set forth a greater sum, to wit, the sum of five thousand one hundred and eighty-four and $\frac{30}{100}$ dollars ($5,184.30), while operating under the classification and schedule in force as aforesaid than it charged, demanded, and received from said Marshall Consolidated Coal Mining Company for like service, upon like conditions and under similar circumstances, in the manner, and to the extent above mentioned, without the knowledge or consent of plaintiffs; that the defendant in manner and to the extent above alleged made concessions of rates, allowed said "Marshall Consolidated Coal Mining Company" drawbacks, and made special contracts with said company for shipping and carrying its said coal which were not open to and allowed all persons, companies, or corporations, including plaintiffs, alike at the same rate per ton per mile upon like conditions and under *si*lar circumstances, without obtaining the approval of said railroad commissioner in writing or otherwise; that the defendant, with the connivance, consent, and procurement of said Marshall Consolidated Coal Mining Company, without the knowledge or consent of plaintiffs, and unbeknown to the general public, at said times secretly and clandestinely granted and made the aforesaid discriminations, concessions, and rebates in favor of said Marshall Company, with the intent and design to deceive and mislead plaintiffs, and fraudulently concealed from
20 the plaintiffs and public the facts relating to such discriminations, rebates, drawbacks, and concessions till on or about the 12th day of August, 1887, after the commission of the aforesaid grievances with like intent and design; that the plaintiffs were misled and deceived in consequence of such devices, practices, and concealment and remained in total ignorance thereof till on or about the date last mentioned, without any fault or blame on their part; that such discriminations, rebates, and concessions were made, practiced, and granted in such a clandestine, secret, and surreptitious manner that it was impossible for plaintiffs, although they did exercise due diligence in the premises, to have discovered or to know anything about the same prior to that date, and that they could not under the circumstances, as heretofore alleged, have discovered the same prior to that date by the exercise of any diligence in their power or at their command to exercise in that behalf.

The plaintiffs allege on information and belief that the defendant at the said times allowed and granted other party or parties to them unknown, similarly situated to them in said business, the same rebates, concessions, and special rates for the carrying and shipment of their coal over defendant's said line of road from said town of Marshall and other places located thereon to the said city of Denver under like conditions and similar circumstances; that such rebates, concessions, and special rates were allowed and granted to the said Marshall Consolidated Coal Mining Company,

as above detailed; that the labor and expense performed and sustained by the defendant in handling and shipping plaintiffs' coal, as above alleged, was less in value than the handling and shipping the said Marshall Consolidated Coal Mining Company's said
21 coal and all the said parties' coal as aforesaid; that all the coal referred to in this complaint was about the same quality and cost the defendant the — price to handle and ship the same over its said lines under similar conditions and like circumstances, and for any overcharges, concessions, and rebates under such conditions and circumstances the defendant was liable to the parties damaged in triple damages under the laws of Colorado; that such charges to plaintiffs for such transportation services were and are unreasonable, unjust, and extortionate; that all such overcharges, discriminations, rebates, concessions, and extortions were made, practiced, and allowed by defendant without the sanction or approval of said railroad commissioner in any manner whatsoever; that on or about the 12th day of August, 1887, at the said city of Denver, before this action, the plaintiffs duly demanded of the defendant that it repay them said overcharges of five thousand one hundred eighty-four $\frac{30}{100}$ dollars; that defendant then and there refused and still refuses to pay the said sum or any part thereof; that the defendant then and there denied all liability whatever to plaintiffs concerning the claims and grievances of plaintiffs aforesaid and peremptorily refused, though requested, to settle and adjust the same in any manner whatever; that the delay of defendant in neglecting and refusing to repay plaintiffs said sum of $5,184.30 has been ever since said date and is unreasonable and vexatious.

Wherefore plaintiffs ask judgment on said count or cause of action in the sum of fifteen thousand five hundred fifty-two and $\frac{90}{100}$ dollars ($15,552.90), with interest at the rate of ten per cent. per annum from the 12th day of August, 1887; also a reasonable attorney's fee, to be fixed by the court, and costs.

SAMPSON & MILLETT,
Attorneys for Plaintiffs.

22 THE STATE OF COLORADO, }
County of Arapahoe, } ss:

Henry Goodridge, being duly sworn, deposes and says:

L. I am one of the plaintiffs above named, duly authorized in the premises to make this affidavit.

2. I have heard read the foregoing amended complaint as to the first cause of action in said cause and know the contents thereof; that the same is true of my own knowledge except those matters therein stated on information and belief, and as to those matters I believe it to be true.

HENRY GOODRIDGE.

THE STATE OF COLORADO, } ss:
County of Arapahoe, }

Subscribed and sworn to before me this 14th day of May, A. D. 1888.

[SEAL.] F. D. CARPER,
Notary Public.

My commission expires M'ch 21st, 1892.

(Indorsed:) 2237. Circuit court U. S. Henry Goodridge *et al. vs.* Union Pacific R'y Co. Amended first count to complaint. Filed May 15, 1888. William A. Willard, clerk. Sampson & Millett, for pl'ff-.

23 And afterwards and on, to wit, the 25th day of May, A. D. 1888, came the said defendant, by Messrs. Teller and Orahood, its attorneys, and filed in said court and in said cause its answer to the complaint heretofore filed herein, and the said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of the United States, District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs, }
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. }

The said defendant, answering the complaint of the said plaintiffs herein, denies each and every material allegation in said complaint contained.

And for a further answer to the amended first count of the said complaint says that whether the said plaintiffs were copart-
24 ners in business at the time mentioned said defendant has no means of information upon which to found a belief.

This defendant further denies that the said plaintiff- at the time mentioned in said complaint or between the dates mentioned in said complaint shipped over the line of defendant's road twelve thousand nine hundred and sixty and sixteen hundred sixty-five twenty-hundre-ths tons of coal or any other amount, but admit- that whatever coal said plaintiffs did ship, if any, was shipped at the rate of one dollar per ton from said mines to Denver, and that said rate of one dollar per ton was the regular schedule price charged to everybody shipping coal over said line from said Erie or Marshall mines to said city of Denver, except the Marshall Consolidated Coal Mining Company, which defendant alleges, by reason of the contract hereinafter mentioned, paid more than one dollar per ton. Defendant admits that the Marshall Consolidated Coal Mining Company was also working mines at Marshall and did during said time ship a large amount of coal, to wit, one hundred and fifty thousand tons per annum, but denies that the defendant then and

there or at any time allowed or paid said Marshall Consolidated Coal Mining Company a rebate of forty cents per ton for coal so shipped as aforesaid, and denies that such rebates or any rebates amounted to the sum of $58,000, as in said complaint alleged; admits that there was no written approval or any other approval of the railroad commissioner of Colorado, and avers that there were no contracts to reduce rates or to charge a less rate to one party than to another so as to require the approval of the railroad commissioner or of anybody else, and denies that it ever charged, demanded, or received from the plaintiffs or from any other person or company for the transportation of coal over the road of the
25 said defendant the sum of $5,184.30 or any other sum while operating under the classification and schedule in force more than it charged, demanded, or received from the said Marshall Consolidated Coal Mining Company for like services, upon like condition and under similar circumstances, or than it received from any other person or corporation whatever, either with or without the knowledge or consent of the plaintiffs.

Denies that the defendant in manner and to the extent set forth in the complaint or in any manner or to any extent ever made any concession of rates or allowed the said Marshall Consolidated Coal Mining Company drawbacks or made any special contracts with said company for the shipping and carrying its coal which were not *upon* to and allowed all persons, companies, or corporations, including the plaintiffs, at the same rate per ton per mile upon like conditions and under similar circumstances; denies that this defendant, with or without connivance, consent, or procurement of the said Marshall Consolidated Coal Mining Company or without the knowledge or consent of plaintiffs or unbeknown to the general public, at any time ever *made*, secretly or clandestinely, granted and made any discrimination, concession, or rebates in favor of said Marshall Consolidated Coal Mining Company with intent and design to deceive and mislead plaintiffs, and deny that it ever fraudulently concealed from the plaintiffs or in any manner concealed from the plaintiffs or from the public the facts relating to any discrimination, rebates, drawbacks, concessions, or contracts made to or with the said Marshall Consolidated Coal Mining Company until about the 12th day of August, 1887, or until or at any time.

And deny that from any time it made *it* granted any discrimination, rebates, or concessions in a clandestine, secret, or sur-
26 reptitious manner with or to the said Marshall Consolidated Coal Mining Company or to any other person or corporation, and denies that by any act of the defendant it was ever made impossible for plaintiffs, in exercising due diligence in the premises, to have discovered or known anything about the said contract with the said Marshall Consolidated Coal Mining Company prior to that date, and denies that the said plaintiffs could not have discovered the existence of any and all contracts made with the said Marshall Consolidated Coal Mining Company by the exercise of diligence in their power or at their command; denies that it at any time allowed or granted party, or parties other than the said plaintiff and similarly

situated to them in said business any rebates, concessions, or special rates for the carrying or transportation of coal over its line from the said town of Marshall or from elsewhere to the city of Denver under any conditions or circumstances whatever; deny that any rebates, concessions, or special rates were allowed or granted to the said Marshall Consolidated Coal Mining Company as stated in the said complaint or otherwise; denies that in handling and shipping plaintiffs' coal the labor and expense was less in value than the handling and shipping of the Marshall Consolidated Coal Mining Company's coal, and denies that the coal referred to in said complaint was about the same quality and cost the said plaintiffs about the same price to handle and ship over its said line, and denies that plaintiffs' coal was shipped under similar conditions and like circumstances with that of the Marshall Consolidated Company's coal, and denies that by reason of any overcharges or rebates whatever, under any circumstances whatever, at any time whatever, the defendant ever was liable to the plaintiffs in triple damages
27 under the laws of the State of Colorado or any other laws whatever, and denies that it ever was or had been liable to the plaintiffs for any damages whatever, and especially denies that it is liable for any charges to the plaintiffs for transportation services that were or are unreasonable, unjust, or exorbitant, and denies that it ever made any overcharges, discriminations, rebates, concessions, or extortions against said plaintiffs whatever, and denies that said plaintiffs, by reason of any act done or omitted to be done by said defendant, has suffered any damages whatever, either in the sum of $5,184.30 or in any other sum whatever.

As to the second cause of action defendant denies each and every material allegation in said count contained, and denies that it ever did at any time or place ever make any concessions or rebates to the said Marshall Consolidated Coal Mining Company to the injury or damage of the said plaintiff- in any respect whatever, and denies that the said defendant ever at any time charged to or exacted from the said plaintiffs any exorbitant, excessive, or unreasonable price for the carriage or transportation of its coal, and denies that it ever at any time made any unjust or improper discrimination in favor of the said Marshall Consolidated Coal Mining Company or in favor of any other person or company or against the said plaintiffs.

And as to the third count said defendant says that it is not indebted and never has been indebted to the said plaintiffs in the sum of $5,184 for so much money by the said defendant received or for the use of the said plaintiffs or any other sum whatever, and denies that there is now or ever has been any sum due and payable from the said defendant to the said plaintiffs on any account whatever.

28 And for a second defense the defendant alleges that heretofore, to wit, on or about the 1st day of January, 1880, the Denver, Western and Pacific Railway Company was a corporation organized under the laws of the State of Colorado and engaged in building a railroad from the city of Denver to the towns of Boulder and Longmont; that the line of said defendant's road passed near to

certain lands owned and operated by Augustine G. Langford and others and known as the Marshall coal mine, which said lands were situate in the county of Boulder about four miles this side of the town of Boulder.

That said railway company in constructing the line of its road ran so near the said mine as that a portion of the workings on the grading of said road broke into the workings of said mine; that said breaking in by the construction of said road was claimed to be negligence on the part of said railway authorities and, as it was claimed, resulted in great loss and damage to the owners of the said mine; that in consequence of the breaking in of the said mine it was claimed that the mine took fire and continued to burn for many months, destroying large amounts of coal, large amounts of personal property therein contained, and entailing a large amount of expense on the owners thereof in walling up portions of the mine and subduing the fires therein set as aforesaid; that thereupon suits were instituted by the owners of the mine against said railway company, which said suits were litigated at great expense and for several years in the district court of the county of Boulder and were in litigation and undetermined at the times hereinafter mentioned; that, in addition to the damages so claimed by the owners of account of said fires, the said railway company had failed to
29 obtain the right of way across the grounds of the said Langford and others, constituting the mine heretofore referred to; that the said Denver, Western and Pacific Railway Company ran their road across the said coal lands owned by the said Langford and others for the distance of about a mine; that January 16th, 1882, the said Denver, Western and Pacific Railway Company having become involved in litigation, a judgment was obtained against said company in the name of Charles R. Abbott and Henry Given for the sum of $64,000, which judgment was obtained upon a mechanic's lien and was duly filed of record in the district court of Arapahoe county, and thereupon became and was a lien upon all of the road-bed of the said Denver, Western and Pacific Railway Company; that subsequently the Union Pacific Railway Company became interested in and the owner of the said judgment and also of a large number of bonds which had been issued upon and was a lien upon the Denver, Western and Pacific Railway Company, upon its line of road and the franchises of the said company; that the said road and all the property of the said company was subsequently sold on said lien and came into the hands of the Union Pacific Railway Company and the parties intimately connected therewith; that afterwards, to wit, in the year 1885, in order to make said property valuable to the said railway company, a corporation was duly formed under the laws of the State of Colorado under the name of the Denver, Marshall and Boulder Railway Company, which said corporation was owned and controlled by the Union Pacific Railway Company, and the said Union Pacific Railway Company thereupon proceeded to construct said line of road from Denver to Boulder, and especially to and past the said Marshall coal mine; that the said claim
30 against the Denver, Western and Pacific Railway Company

had before that time and before the *same* of the same upon the judgment aforesaid become a lien upon the road-bed and property of the said Denver, Western and Pacific Railway Company, and after the formation of the said Marshall and Boulder Railway Company the said claim or suit was still being pressed against said property and remained still a lien upon the said road, and was a lien at the time hereinafter stated.

That about the year 1885 the said Langford and others, the owners of the said Marshall coal mine, sold the same to the Marshall Consolidated Coal Mining Company, who then and there became the owners of the said mine, and also by assignment to them the owners of the said claim so in litigation for damages done to the said mine by reason of the acts of the Denver, Western and Pacific Railway Company then being held against said Marshall and Boulder Railway Company; that in 1885 the Union Pacific Railway Company was the owner of a certain coal mine at or near Louisville, in Boulder county.

Defendant further shows that, in addition to the judgments and liens against the Denver, Western and Pacific Railway Company above stated, there *was* also existing from the first day of January, 1881, certain debts by way of bonds and mortgage made by the said Denver, Western and Pacific Railway Company to the extent of about one million dollars; that said bonds were secured by a deed of trust or mortgage upon all the right of way and property of the said Denver, Western and Pacific Railway Company in Colorado, and were a lien upon said property; that some time in 1883 the Farmers' Loan and Trust Company, the trustee in said mortgage, commenced a suit for foreclosure against said Denver, Western and Pacific Railway Company, to which suit Sidney Dillon, Augustine G.
31 Langford, and Joseph M. Marshall, owners of said Marshall coal mine, were made parties; that upon such foreclosure the said owners of the said Marshall coal mine answered by setting up the fact above stated as to the running of the said Denver, Western and Pacific railway over its said lands without obtaining any right to do so, and also the damages accruing to said mine by reason of the said negligent acts of the said Denver, Western and Pacific Railway Company, and claiming that by such acts they had been injured to the extent of eighty-one thousand dollars ($81,000.00).

This defendant further shows that such proceedings were afterwards had in said suit then pending for the foreclosure of the said trust deed against the said Denver, Western and Pacific Railway Company that the said property was put up and sold at master's sale under decree of foreclosure entered in said case; that the rights of the said Langford and others, as shown by their petition, were not adjudicated at that time and their claim and accounting was still undetermined; that at said sale the title was acquired by parties who were acting in behalf of the Union Pacific Railway Company, who then and there at the time of said master's sale had a large interest therein, being the owner of a large number of said bonds of the Denver, Western and Pacific Railway Company; that the said interests of the Denver, Western and Pacific Railway Com-

pany were sold April 4th, 1885, for the sum of three hundred thousand dollars.

That said master's sale was made on the 4th day of April, 1885, and some time thereafter the said party in interest who had bid for said property on said master's sale, to wit, Harper M. Orahood, sold and conveyed the same to the Denver, Marshall and
32 Boulder Railway Company, leaving the said claims of the said Marshall Coal Mining Company unadjusted and unpaid, being still a lien upon the property so conveyed to the Denver, Marshall and Boulder Railway Company.

This defendant further shows that for some time prior to the 13th day of October, 1885, it was receiving its coal for the purpose of running its locomotives from the Union Coal Mining Company, which said company was working a certain coal mine known as the Welch coal mine, situate on Coal creek, in Boulder county; that the title under which the said Welch Coal Mining Company was working arose by and through a proposition made by the said C. C. Welch on the 1st day of November, 1878, to the said Welch Coal Mining Company, which proposition was accepted by the Welch Coal Mining Company on the said first day of November, 1878, and was evidenced by the written resolution of the said company, passed at a meeting of the directors of the same of said 1st day of November, 1878, in words and figures following, to wit:

Resolved, That the proposition of Charles C. Welch to lease to this company his mines and lands on Coal creek, in Boulder county, in the State of Colorado, and to sell his engines, boilers, tools, implements, machinery, fixtures, and materials on hand at said mines, etc., this day made to this company, be, and the same is hereby, accepted.

Carried.

Resolution offered by F. L. Welch:

Resolved further, That 997 full-paid shares of the capital stock of this company be issued and delivered, properly signed, to the said Charles C. Welch, in full payment for the machinery, cars, tools, implements, material, fixtures, etc., at said coal mines this
33 day purchased of the said Welch for *and* the expense of opening the said mine.

Carried.

And also by an assignment of said lease last above mentioned, made by the said Welch Coal Mining Company *and* to the Union Coal Company; which said assignment of said lease is in words and figures following, to wit:

Know all men by these presents that the Welch Coal Mining Company, a corporation organized and existing under the laws of the State of Colorado, for and in consideration of the sum of $1 in hand paid by the Union Coal Company, a corporation organized and existing under the laws of the State of Colorado, have sold and by these presents do grant, convey, assign, transfer, and set over unto the said Union Coal Company a certain indenture of lease filed for record in the office of the recorder of Boulder county, State of

Colorado, on the 30th day of August, A. D. 1879, and recorded in Book 37, on page 499, the same bearing date on the first day of November, 1878, made by Charles C. Welch, of Jefferson county, Colorado, to the said Welch Coal Mining Company, of the right and privilege to work and operate all the coal mines and veins of coal heretofore discovered and opened, and to prospect for and open the same in and upon the following-described lands, situate in the county of Boulder and State of Colorado, to wit:

The N. E. ¼ of the S. E. ¼ of sec. 8; also the S. W. ¼ and the N. W. ¼ and the N. ½ of the N. E. ¼ and the S. E. ¼ N. E. ¼ and the *the* N. W. ¼ of the S. E. ¼ of sec. 9, all in township one south, of range 69 west, and, excepting the said tract of land in said section
34 8, all such surface rights as may be necessary for building or building purposes, for prospecting for coal, with all and singular the premises and rights herein mentioned:

To have and to hold the same unto the said Union Coal Company, its representatives and assigns, from the date hereof for and during all the rest, residue, and remainder of the term of said lease, subject to the rents, covenants, and conditions therein mentioned; and the said Welch Coal Mining Company does hereby covenant with the said Union Coal Company that the said assigned premises are free and clear of all former and other gifts, grants, bargains, sales, leases, and incumbrances whatsoever.

In witness whereof the said Welch Coal Mining Company has caused these presents to be signed and acknowledged by its president, with the seal of said company attached.

[SEAL.] (Signed) S. H. H. CLARK, *President.*

In the presence of—
G. M. CUMMING.

This defendant, further answering, says that on the 13th day of October, 1885, the Marshall Consolidated Coal Mining Company of Colorado was a corporation organized and existing under the laws of the State of Colorado and had become the owner by purchase of all of the coal lands formerly owned by Augustine G. Langford and others and were under the name of the Marshall Coal Mining Company; that the Union Coal Company was at that time interested in coal mines situate at Erie, in Weld county, the Louisville mines, and other mines in said Boulder county; that The Union Pacific Railway Company, this defendant, was at that time the owner of a large portion of the capital stock of said company and con-
35 trolled the operations of the said Union Coal Company; that it had acquired the said stock for the purpose of obtaining coal for its own consumption on its locomotives in the said State of Colorado and elsewhere.

That at said date, on account of the complaints that had theretofore been made by the owners of the Marshall Coal Mining Company and the owners of other mines in Boulder county, this defendant concluded that it was for the best interest of the said Union Pacific Railway Company to discontinue its connections with the said Union Coal Company and to discontinue the actual working of

any mines through said company; that thereupon and for that purpose it entered into negotiations with the said Marshall Consolidated Coal Mining Company for the purpose of procuring the said company to take off its hands or off the hands of the Union Coal Company, controlled and operated by it, the said mines as above stated, and that it was further induced to make said contract from the fact that the former owners of the Marshall coal mine had always been complaining of the rates and giving to the defendant great trouble and annoyance in respect to said complaints about said rates; that it was further induced to enter into said contract for the reason that said Marshall Consolidated Coal Mining Company had succeeded to the rights of the former owners of the Marshall coal mine, together with the right to demand from the Denver, Western and Pacific Railway Company or its assignees damages as were claimed at that time, the said lands of the Denver, Western and Pacific having already at that time been conveyed to the Denver, Marshall and Boulder Railway Company subject to said claim, and therefore, for the purpose both of getting rid of the operation of said mines formerly operated by the Union Coal Company and for the purpose of providing this defendant with some source upon
36 which it could rely for the coal needed by it for consumption on its locomotives, and for the further purpose of settling the said claim so made by the former owners of the said Marshall Coal Mining Company and assigned to the Marshall Consolidated Coal Mining Company, it made and entered into an agreement in words and figures following, to wit:

This contract, made this thirteenth day of October, 1885, between the Union Pacific Railway Company (a corporation organized and existing under the laws of the United States), of the first part, hereinafter designated as the "railway company," and the said Marshall Consolidated Coal Mining Company of Colorado (a corporation organized and existing under the laws of the State of Colorado), of the second part, hereinafter designated as "the coal company," witnesseth as follows:

Whereas the Union Coal Company of Colorado is the owner, lessee, or otherwise interested in the coal mines known as the Boulder Valley mines, situate at Erie, Weld county, Colorado, and the Northrup mine, so called, one and one-half miles west of Erie, in said Weld county, on lands originally owned by the Denver, Pacific Railway & Telegraph Company; and

Whereas it is the lessee of a coal mine known and designated as the Welch mine, situate at Louisville, Boulder county, Colorado, on the Colorado Central railroad, under a lease executed by Charles G. Welch, of the Welch Mining Company, dated November 1st, 1878; and

Whereas the Union Pacific Railway Company is the owner of the capital stock of the Union Coal Company and has heretofore controlled and operated said mines; and
37 Whereas it is for the interest of the Union Pacific Railway Company and Union Coal Company to discontinue the actual working of the said mines and contract with said coal com-

pany to furnish said railway company any and all coal which said railway company may use for its consumption and for the consumption of its branches, connections, and railways owned, operated, managed, or otherwise controlled by said railway company, not to exceed fifty thousand (50,000) tons per annum the first year and one hundred thousand (100,000) tons per annum for the second year and every year thereafter:

Therefore, in consideration of the mutual advantages to accrue to the respective parties to the said contract and the sum of one dollar ($1.00) paid by each to the other, it is hereby mutually agreed as follows:

In consideration of the said railway company and the said Union Coal Company going out of business of mining coal in the counties of Boulder and Weld, in the State of Colorado, and the purchase of coal used by it for its own consumption of the said coal company at the rate herein agreed on, and in consideration of the rates for the transportation of coal herein agreed on by said railway company, the said coal company agrees to furnish from its mines to be hereafter acquired, now known as the "Marshall mines," all coal ordered by said railway company for its own use or consumption and for the consumption and use of its branches and connections owned, operated, managed, or otherwise controlled by the said railway company; such amount, however, not to exceed fifty thousand (50,000) tons per annum for the first year and one hundred
38 thousand (100,000) tons per annum thereafter.

Said coal to be delivered loaded on the cars at the mouth of the mines at the actual cost per ton of mining and loading the same, but in no case to exceed the cost of one dollar and twenty-five cents per ton, delivered and loaded on the cars as aforesaid.

Said coal so to be delivered to be pure, well-screened coal, free from slate and other foreign and refuse substances; all settlements and payments to be made monthly between the parties.

It is further stipulated and agreed that the said coal company shall transport all coal mined by it in the counties of Weld and Boulder, other than such as is delivered by it to the Union Pacific Railway Company, its branches and connections from Denver, including and comprising all railways owned, managed, operated, or otherwise controlled either directly or indirectly by the said Union Pacific Railway Company so long as the rates do not exceed those charged by competing railway companies.

It is further stipulated and agreed that the Union Pacific Railway Company shall give to said Marshall Consolidated Coal Mining Company for the transportation of coal mined from above mines over the Union Pacific railway, its branches and connections from said mine to Denver, the regular tariff rate not exceeding one dollar per ton unless two hundred thousand tons shall be mined and furnished for transportation from said Marshall Consolidated Coal Mining Company's mines in Colorado and transported over said railway company's lines yearly, in which case a rate of sixty cents per ton shall be given for all coal transported: Provided that in case the tariff rate shall be reduced by said railway company below one dol-

lar per ton during the period of said reduction the rate of
39 said coal company shall be reduced in like ratio*n*.

It is further agreed that the said railway company shall furnish at all times a supply of cars at the mines aforesaid so that there shall be no delay in loading and transporting coal as fast as the same shall be mined by said company.

It not being intended, however, to include delays resulting from accidents or providential or other causes beyond the control of the said railway company; the said railway company shall also erect and maintain at their own expense all the necessary side tracks and switches for the purpose of loading and transporting coal both at the said mine and the city of Denver, and shall, within a reasonable time and without unnecessary delay, build and extend the track of the Denver, Western and Pacific railway, now known as the "Denver, Marshall & Boulder railway," to the said mines, and have the same in running order from Denver to the said Marshall coal mines.

Said mines shall at all times be kept accessible for the examination of the said railway company or any person whom it may designate for examining into the condition, management, working, and operation of the same, and the foregoing shall be deemed to include the books of account and records of the proceedings of said coal company and of its business.

It is further contracted and agreed that for the purpose of ascertaining and fixing the weight of the coal to be delivered by the said coal company to the said railway company, as heretofore provided, the said railway company may at any time demand that said coal be weighed upon the cars upon its own scales and by its own agents at the mines, and if any differences shall arise in respect to the weights and measurements or in respect to any other matters covered
40 and included by said contract the same shall be settled by a board of arbitration, to be organized at the instance of either party, as hereinafter provided.

The party demanding arbitration shall serve upon each of the other parties to said proposed contract whose interest may be affected by the decision a written notice of such demand and the name of one disinterested party chosen by the demandant for arbitrator. The other parties notified shall each within ten days after receiving such notice select a disinterested person as arbitrator and shall notify the other parties of such selection. If any party notified shall neglect or refuse to select an arbitrator within ten days of receiving such notice, the arbitrator or arbitrators chosen shall select the number necessary to give the parties interest- each an arbitrator in said board, and in case such selection shall consist of an even number the board thus constituted shall select an additional arbitrator. The arbitrators so chosen shall fix the time and place for hearing if requested by either party and shall give to the parties interested reasonable notice thereof. At the time and place named they shall proceed with the hearing. If the majority of the arbitrators shall agree upon an award and shall reduce the same to writing, it shall be binding and conclusive upon all the parties who

joined in the arbitration from the date of the delivery of a copy of such award or decision to each of the parties to the arbitration and shall be enforced accordingly.

It is further contracted and agreed that in case the Union Pacific Railway Company shall order coal in excess of the amount hereinbefore stipulated for for commercial uses or uses other than hereinbefore specified of the said coal company said orders shall be
41 filled from said Marshall mines without unreasonable delay, and the price to be paid for all coal furnished on such orders shall be the cost of mining and delivery of the same on board the cars at the mouth of the mines plus fifty cents per ton, but with this limitation—namely, that in no case shall the cost to said railway company of such coal upon the cars at the mine exceed one dollar and forty cents per ton; provided no orders for such commercial uses shall be made for coal to be sold except of the main line of the Union Pacific railway and lines owned, leased, and operated, or otherwise controlled by said company north of Greeley, Colorado. This exception is not to exclude any lines in Utah or any mines in Nebraska reached by branches and connections from the main line in Nebraska, although the same or some branch thereof may be situated south of Greeley.

It is further contracted and agreed by and on the part of the said coal company as a part of the consideration of this contract that a majority of the capital stock of said Marshall Consolidated Coal Mining Company shall for a period of two years from the date of this contract be held in case the company shall desire to sell and shall offer the same for sale, be first offered to said railway company at the price bid therefor by any responsible purchaser, and that the said railway company shall have the option of taking the same at such price during the said period of two years in preference to any other purchaser.

It is hereby understood by and between the parties to this contract that if either, after the execution of this contract, is temporarily unable to perform his part of the said contract on account of strikes by laborers, miners, and others employed by either, that during such strikes neither party shall be held by the other
42 to the terms of said contract, but shall conform as nearly to the same as circumstances shall permit.

It is further contracted and agreed that said coal company shall pay for all machinery taken from Erie, Northrup, and Louisville mines a reasonable compensation, to be determined in case of difference by arbitration, and said coal company shall take all machinery from said mines available for its use.

This contract shall be and remain in force for a period of five (5) years from the signing thereof.

In witness thereof the respective corporation- parties hereto have caused these presents to be signed by their respective presidents and

secretaries and their respective corporate seals to be hereunto attached the day and year first above written.

UNION PACIFIC RAILWAY CO.,
[SEAL.] By CHAS. F. ADAMS, JR., *President.*

Attest: HENRY McFARLAND, *Secretary.*

THE MARSHALL CONSOLIDATED COAL MINING CO.
[SEAL.] J. F. CHAFFEE, *President.*

Attest: GEO. C. LYMAN, *Secretary.*

This defendant, further answering, says that said contract and the negotiations leading thereto *was* mainly made by and between Charles F. Adams, Jr., its president, and J. B. Chaffee, president of the Marshall Consolidated Coal Mining Company, and was the subject of correspondence between them; that from the fact that the said Charles F. Adams was not intimately acquainted with the facts hereinbefore set forth as to the claim for damages made by
43 the said former owners of the Marshall Coal Mining Company, and also held by the Marshall Consolidated Coal Mining Company against this defendant, the said contract failed to mention anything about the said settlement of said claim; that the said contract, upon being signed by Charles F. Adams, president, and by the said J. B. Chaffee, president of the Marshall Consolidated Coal Mining Company, was sent forward to A. J. Poppleton, Esq., the attorney for said defendant, with instructions to look over the same, and, if anything further was needed in order to settle the controversy between said companies that might grow out of anything theretofore existing between the owners of the Marshall coal mine and this defendant, that it should be provided for in a separate instrument and submitted to the Marshall Consolidated Coal Mining Company, and that, upon the approval of the said A. J. Poppleton, the said contract should be delivered to the said Marshall Consolidated Coal Mining Company, and thereupon the said A. J. Poppleton, being well acquainted with the facts in respect to the litigation theretofore existing against the Denver, Western and Pacific Railway Company on account of the damages as aforesaid, and well knowing that the same was a lien upon the property of the said Denver, Western and Pacific Railway Company, and knowing that the right of way for the said Denver, Marshall and Boulder Railway Company had not been settled for or obtained over said lands, prepared the following instrument in writing, to wit:

Know all men by these presents that the Marshall Consolidated Coal Mining Company of Colorado, as principal, and J. B. Chaffee and David H. Moffatt, as sureties, are held and firmly bound unto the Union Pacific Railway Company in the penal sum of ten thousand dollars well and truly to be paid to the said railway company, its successors or assigns; to which payment, well and truly
44 to be made, we bind ourselves, our successors and assigns firmly by these presents.

Signed and sealed this 29th day of October, A. D. 1885.

The obligation, however, is upon the following conditions, namely:

Whereas the Union Pacific Railway Company has contracted with the said Marshall Consolidated Coal Mining Company of Colorado for the delivery *of* the said railway company of certain coal, as in said contract of even date herewith set forth between the said parties; and

Whereas the said Union Pacific Railway Company and the Union Coal Company hold a certain mine known as the "Welch mine" under a lease executed by Charles C. Welch, of the Welch Mining Company, dated November 1st, 1878; and

Whereas there are outstanding against the Denver, Western and Pacific Railway Company and its successors, the Denver, Marshall & Boulder Railway Company, certain claims for damages resulting to the so-called Marshall mines by reason of the location and construction of the Denver, Western and Pacific railroad through and over the said so-called Marshall mine; and

Whereas it was a part of the consideration of said contract that the said Marshall Consolidated Coal Mining Company should indemnify and hold harmless the Union Pacific Railway Company, the Denver, Western and Pacific Railway Company, and its successors, the Denver, Marshall and Boulder Railway Company, against all claims and demands of any character and description against any and either of the said parties for damages by reason of the location and construction of the railways of any of the said companies through or over the lands upon which the so-called "Marshall mines" are situated and the said mines themselves, and should also indemnify and hold harmless the said Union Pacific Railway Company against any damages which might accrue to it by reason of conveying the lease of the said Welch mine to the said Consolidated Coal Mining Company and the delivery of the possession thereof to the said company and the working thereof by the said company:

Now, therefore, if the said Marshall Consolidated Coal Mining Company of Colorado shall indemnify and hold harmless the said Union Pacific Railway Company, the said Denver, Western and Pacific Railway Company, and the Denver, Marshall and Boulder Railway Company against all loss and damages or claims or demands of any kind whatever accruing to any or either of them, said parties, by reason of the matters hereinbefore stated and set forth, and especially against all claims for damages by reason of the location, construction, and operation of the railway or railways over, through, and upon said so-called "Marshall mines" and the property appurtenant thereto, and by reason of the transfer of said Welch mine to the said Marshall Consolidated Coal Mining Company, and of the delivery to the said Consolidated Coal Mining Company of the possession of the said Welch mine and its occupation and the working and use thereof or non-working or use thereof

by the said Welch Coal Mining Company, then this obligation to be void; otherwise in full force and effect.

MARSHALL CONSOLIDATED COAL MINING CO.,
By J. B. CHAFFEE, *President.*

Attest: GEO. C. LYMAN, *Secretary.*

J. B. CHAFFEE,
D. H. MOFFATT, *Sureties.*

46 Which said instrument was thereupon presented to Jerome B. Chaffee, the president of the said Marshall Consolidated Coal Mining Company, as a part and parcel of and to accompany the said contract of October 13th, 1885, and thereupon the said J. B. Chaffee, as president of the said Marshall Consolidated Coal Mining Company, executed the same, and the same was thereupon submitted to this defendant, and thereupon the contract of October 13th, 1885, was delivered to said Marshall Consolidated Coal Mining Company and became effective between said parties; and afterwards, at request of the said Marshall Consolidated Coal Mining Company, the said former owners of the said Marshall mine, the said Marshall Coal Mining Company, Augustine G. Langford, and Joseph M. Marshall executed unto the Union Pacific Railway Company and the Denver, Marshall and Boulder Railway Company a receipt in full discharging the said Union Pacific Railway Company and the Denver, Marshall and Boulder Railway Company, its successors and assigns, from all suits, actions, and causes of actions existing for or by reason of any matter or anything pertaining to the construction of the Denver, Western and Pacific Railway Company.

This defendant further says that the sole and only variation from the schedule rates made by this defendant in respect to the carriage of coal by any parties over the Denver, Marshall and Boulder Valley road is that made by and between this defendant to the said Marshall Consolidated Coal Mining Company, and that it was made for the reasons above given and for no other reasons whatever.

And this defendant further says that it is informed and believes that it costs to the said Marshall Consolidated Coal Mining Company, and would have cost to this defendant had it continued to
47 mine the Louisville mine through the Union Coal Company, the sum of at least $1.60 per ton to mine coal from the said Marshall Consolidated Company mine and to get the same in cars upon the tracks provided for in this contract, and that it would have cost this defendant the same to mine from the Louisville and Erie mines had it continued to mine for its own use in said mines; and this defendant further says that on account of the settlement of the claims made against it by the said Marshall Consolidated Mining Company, which said claims were settled and provided for in the said contract above set forth, and on account of the coal necessarily used by it, the defendant and furnished to it by the said Marshall Consolidated Coal Mining Company under the terms of the contract above set forth, the said Marshall Consolidated Mining Company

have paid to this defendant and this defendant has received of the Marshall Consolidated Coal Mining Company a higher rate as a matter of fact than $1.00 per ton, although it was not intended that the rate should exceed the scheduled price; that at the time of the making of said contract it was believed that the price at which the coal was to be furnished to this defendant for its use on locomotives, and on account of the settlement of the claims as aforesaid, and on account of the benefits accruing to this defendant by reason of the Marshall Consolidated Mining Company taking and operating the said Louisville and Erie mines, this defendant would receive from the said Marshall Consolidated Coal Mining Company for the said period of five years, during which said contract was to operate, the same price as that fixed in the schedule price.

This defendant further says that the price in the schedule rates as $1.00 per ton for transportation from Marshall to Erie coal beds was a fair and reasonable price for the carriage of said coal over said
48 lines; that the length of line was about thirty miles, and that on account of the length of time in which the cars were necessarily delayed in loading and unloading the price so fixed for carriage over said thirty miles was fair and reasonable and was in no manner exorbitant.

TELLER & ORAHOOD,
Attorneys for Defendant.

STATE OF COLORADO, } ss:
Arapahoe County, }

Harper M. Orahood, being duly sworn, on his oath says he is one of the attorneys for the above-named corporation defendant; that he has read said answer and knows the contents thereof, and that the same is true to his best knowledge, information, and belief.

(Signed) HARPER M. ORAHOOD.

Subscribed and sworn to before me this 2d day of June, A. D. 1888.

[SEAL.] WILLIAM A. WILLARD,
Clerk District Court United States, District of Colorado.

(Indorsed:) 2237. U. S. C. C., dist. of Colo. Goodridge and Marfell *vs.* The Union Pacific R'y Co. Answer. Filed May 25, 1888. William A. Willard, clerk. Teller & Orahood, def't'- att'ys.

49 And afterwards and on, to wit, the 12th day of June, A. D. 1888, came again the said plaintiffs, by their attorneys aforesaid, and filed in said court and in said cause their demurrer to the answer heretofore filed herein, and the said demurrer is in words and figures as follows, to wit:

Demurrer to Answer.

In the Circuit Court of the United States, District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Demurrer.

Plaintiffs demur to the answer of said defendant filed herein for the following reasons:

First. That the denials contained therein of the material allegations of the plaintiffs' first and second causes of action are indefinite, ambiguous, and uncertain, in that it leaves the defendant to determine in its own mind those allegations which it deems are material.

Second. That said second defense does not state facts sufficient to constitue a defense to this action.

50 That said alleged contract and proceedings therein are absolutely void and of no effect as against the plaintiffs' causes of action alleged in their said complaint.

SAMPSON & MILLETT,
Attorneys for Plaintiffs.

(Indorsed:) 2237. In the circuit court of the U. S., district of Colorado. Henry Goodridge *et al. vs.* U. P. R. R. Co. Demurrer to the answer. Filed Jun- 12, 1888. William A. Willard, clerk. Sampson & Millett, att'ys for plaintiffs.

And afterwards and on, to wit, 9th day of January, A. D. 1889, there was handed down and filed in said court and in said cause an opinion on demurrer to answer, and the said opinion is in words and figures as follows, to wit:

Opinion on Demurrer to Answer.

In the Circuit Court of the United States for the District of Colorado.

JANUARY 9, 1889.

HENRY GOODRIDGE *et al.*
vs.
THE UNION PACIFIC RAILWAY CO. } No. 2237.

51 HALLETT, *J.*:

In the second defense the discrimination of which plaintiffs complain is justified on the ground that defendant has become liable to the Marshall Consolidated Coal Mining Company (the favored company) in respect to a claim for damages against the Denver,

Western and Pacific Railway Company for a trespass committed on the lands now owned by the Marshall Company in building the road on and across such lands. It is alleged that the Denver & Western Company broke into the mine and set fire to it, from which great damage resulted to the owners of the property. This claim for damages has been acquired by the Marshall Company and may be enforced against the road built by the Denver, Western & Pacific Company, now owned by defendant. The amount of the claim and the extent to which it became the consideration of the contract with the Marshall Company to carry for that company at a less rate than for others is not shown.

It is also alleged in this defense that before the time of making the contract with the Marshall Company for giving to that company less rates than to others and in the year 1878 the defendant made a contract with the Union Coal Company, the details of which need not be stated, but defendant in the year 1885 was convinced that it would be expedient and necessary to cancel the contract with the Union Coal Company and make the contract with the Marshall Company which is set out in the answer. On that point the answer read as follows:

"That at said date, on account of the complaints that had theretofore been made by the owners of the Marshall Coal Mining Company and the owners of other mines in Boulder county, this defendant concluded that it was for the best interest of the said
52 Union Pacific Railway Company to discontinue its connections with the said Union Coal Company and to discontinue the actual working of any mines through said company; that thereupon and for that purpose it entered into negotiations with the said Marshall Consolidated Coal Mining Company for the purpose of procuring the said company to take off its hands or off the hands of the Union Coal Company, controlled and operated by it, the mines as above stated, and that it was further induced to make said contract from the fact that the former owners of the Marshall coal mine had always been complaining of the rates and giving to the defendant great trouble and annoyance in respect to said complaints about said rates; that it was further induced to enter into said contract for the reason that said Marshall Consolidated Coal Mining Company had succeeded to the rights of the former owners of the Marshall coal mine, together with the right to demand from the Denver, Western and Pacific Railway Company or its assignees damages as were claimed at that time, the said lands of the Denver, Western and Pacific having already at that time been conveyed to the Denver, Marshall and Boulder Railway Company subject to said claim, and therefore, for the purpose both of getting rid of the operation of said mines formerly operated by the Union Coal Company and for the purpose of providing this defendant with some source upon which it could rely for the coal needed by it for consumption on its locomotives, and for the further purpose of settling the said claim so made by the former owners of the said Marshall Coal Mining Company and assigned to the Marshall Consolidated Coal

Mining Company, it made and entered into an agreement in words and figures following, to wit."

And in the contract with the Marshall Company the prior agreement with the Union Coal Company and the desire of the parties to discontinue business under it is referred to as included in the
53 terms of the contract, and the Marshall Company agrees to furnish coal at the mine for defendant's use at the cost of mining and loading on cars, not to exceed $1.25 per ton, and to have all its coal carried on defendant's lines so far as they may extend. Defendant agrees to carry the coal for $1.00 per ton "unless two hundred thousand tons shall be mined and furnished for transportation yearly, in which case a rate of sixty cents per ton shall be given for all coal transported." If coal is ordered by defendant "for commercial uses" it shall be furnished at the cost of mining and delivery on board cars, with fifty cents per ton added, and if within two years from the date of the contract the Marshall Company shall desire to sell its capital stock defendant shall have the right to buy "in preference to any other purchaser." The contract is to remain in force five years.

Further on and in concluding the answer reads as follows:

"This defendant further says that the sole and only variation from the schedule rates made by this defendant in respect to the carriage of coal by any parties over the Denver, Marshall & Boulder Valley road is that made by and between this defendant to the said Marshall Consolidated Coal Mining Company, and that it was made for the reasons above given and for no other reasons whatever.

"And this defendant further says that it is informed and believes that it costs to the said Marshall Consolidated Coal Mining Company, and would have cost to this defendant had it continued to mine the Louisville mine through the Union Coal Company, the sum of at least $1 60 per ton to mine coal from the said Marshall Consolidated Company mine and to get the same in cars upon the track as provided for in this contract, and that it would have
54 cost this defendant the same to mine from the Louisville and Erie mines had it continued to mine for its own use in said mines.

"And this defendant further says that on account of the settlement of the claims made against it by the said Marshall Consolidated Mining Company, which said claims were settled and provided for in the said contract above set forth, and on account of the coal necessarily used by it, the defendant, and furnished to it by the said Marshall Consolidated Coal Mining Company under the terms of the contract above set forth, the said Marshall Consolidated Mining Company have paid to this defendant and this defendant has received of the Marshall Consolidated Coal Mining Company a higher rate as a matter of fact than $1.00 per ton, although it was not intended that the rate should exceed the schedule price; that at the time of making of said contract it was believed that the price at which the coal was to be furnished to this defendant for its use on locomotives, and on account of the settlement of the claims as aforesaid, and on account of the benefit accruing to this defendant

by reason of the Marshall Consolidated Mining Company taking and operating the said Louisville and Erie mines, this defendant would receive from the said Marshall Consolidated Coal Mining Company for the said period of five years, during which said contract was to operate, the same price as that fixed in the schedule price."

From all this it is apparent that the answer sets up certain considerations received by the defendant from the Marshall Company, upon which less rates are given to the latter than to other shippers, and these considerations are not in the way of a charge for carrying coal upon which any estimate can be made to ascertain the
55 *the* amount of such charge. Whether we refer to the claim for damages against the Denver & Western Company or to the matter of furnishing coal for defendant's use or to any other consideration for the contract, it is plain that there is no basis of calculation other than the rate fixed in the contract itself. It is not possible to say how much, if anything, should be added to the contract price for carrying coal on account of the claim for damages against the Denver & Western Company or on account of cancelling the contract with the Union Coal Company or on account of furnishing coal at cost for defendant's use or on account of furnishing coal for sale at a reduced price or on account of other matter mentioned in the answer. The whole answer amounts only to this: that the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination. The constitution of the State provides that "no undue or unreasonable discrimination shall be made in charges * * * for transportation of freight * * * within the State," and the law enacted to enforce that provision is that "no railroad company shall * * * charge, demand, or receive from any person, company, or corporation for the transportation of persons or property or for any other service a greater sum than it shall while operating under the classification and schedule then in force charge, demand, or receive from any other person, company, or corporation for a like service from the same place or upon like conditions and under similar circumstances, and all concessions or rates, drawbacks, and contracts for special rates shall be open to and allowed all persons, companies, and corporations alike at the same rate per ton per mile upon like conditions and under similar circumstances."

56 This law cannot be controlled or defeated by any agreement between the railroad company and the favored shipper. It is true that when the consideration paid for reduced rates by the favored shipper is obviously equal to the discount allowed him the law does not apply. Whenever that fact appears, since it matters not in what form the shipper pays the usual rates, the alleged discrimination disappears and the contract is no longer obnoxious to the law. If, to illustrate, the damages due from the Denver & Western Company had been liquidated and the agreement was to carry a certain quantity of coal for the amount so fixed, the question

would be different. As it stands the agreement is to give the Marshall Company a reduced rate for certain considerations which defendant says are sufficient to make up the discount from the schedule rate; and as to that matter the fact cannot be ascertained from the contract or otherwise.

So understood, it is clear that the contract affords no protection to defendant or the discrimination in rates to which plaintiffs and other shippers of coal over defendant's road are subjected.

In this case no difficulty arises as to the meaning of the words unjust or undue discrimination in the law. Plaintiffs and the Marshall Company are dealers in coal in the same market, depending largely on the same rates of transportation for the profits of their business. The direct effect of a reduced rate to the Marshall Company is to reduce the profits on plaintiffs' coal to the extent of such reduction.

The demurrer to the second defense will be sustained.

A general denial of all material allegations in the complaint
57 was not allowed under the code of 1877; but it is authorized by the new code of 1887, sec. 56, and the demurrer to the first defense will be overruled.

(Indorsed:) 2237. Circuit court U. S. Henry Goodridge *et al. vs.* Union Pacific R'y Co. Opinion on demurrer to answer. Filed Jan. 9, 1889. William A. Willard, clerk.

And afterwards and on the same day, to wit, the 9th day of January, A. D. 1889, the same being one of the regular juridical days of the November term, A. D. 1888, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Demurrer to Answer Overruled as to First Defense and Sustained as to Second Defense.

HENRY GOODRIDGE and HIRAM MARFELL *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 2237. Action for Damages.

At this day come the said plaintiffs, by Byron Millett, Esq., their attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes.

And the demurrer to the answer of the said defendant
58 having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here that the first defense of the said answer is sufficient in law and the said second defense of the said answer is not sufficient in law, and so the said demurrer is overruled as to the said first defense and sustained as to the second defense of the said answer.

And afterwards and on, to wit, the 5th day of March, A. D. 1889, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause a plea of statutes of limitation, and the said plea is in words and figures as follows, to wit:

Plea of Statute of Limitations.

In the Circuit Court of the United States, District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant herein, and for a third defense and answer herein says—

59 That the plaintiffs' action herein was not commenced within one year after the offence or offences upon which plaintiffs' complaint is founded was and were committed or is alleged to have been committed, and that a part, if not the whole, of the amount sued for, as set forth, is for a penalty which accrued to the said plaintiff-, if at all, more than one year prior to the commencement of this action and more than one year after the plaintiff-*was* acquainted with the facts upon which said action is now brought.

TELLER & ORAHOOD,
Attorneys for Defendant.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Willard Teller, being first duly sworn, on his oath deposes and says—

That he is one of the attorneys for The Union Pacific Railway Company, the within-named defendant; that he has read the foregoing answer and knows the contents thereof, and that the facts which are therein stated are true to the best of his knowledge and belief.

That said defendant is a corporation, and for that reason affiant makes this verification in its behalf.

WILLARD TELLER.

Subscribed and sworn to before me this 2nd day of March, A. D. 1889.

[SEAL.] CHARLES M. KENDALL,
Notary Public.

My commission expires August 16, 1892.

60 (Indorsed:) 2237. U. S. C. C. Henry Goodridge *et al.* *vs.* The U. P. R'y Co. Plea of statute of limitations. Filed Mar. 5, 1889. William A. Willard, clerk. Teller & Orahood, att'ys for def't.

And afterwards and on, to wit, the 15th day of May, A. D. 1889, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their replication to the plea of statute of limitations heretofore filed herein, and the said replication is in words and figures as follows, to wit:

Replication to Plea.

In the United States Circuit Court for the District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs, *vs.* THE UNION PACIFIC RAILWAY COMPANY, Defendant. } Replication to Third Defense.

The plaintiffs, for replication to defendant's third defence, say that they deny each and every material allegation therein contained; say that the plaintiffs' action was commenced within one year after the offence or offences upon which plaintiffs' complaint is founded was and were committed or is alleged to have been committed

61 They deny that a part or the whole of the amount sued for accrued to said plaintiff- more than one year prior to the commencement of this action or more than one year after the plaintiffs were acquainted with the facts upon which said action is now brought.

SAMPSON & MILLETT,
Attorneys for Plaintiffs.

THE UNITED STATES OF AMERICA.

THE STATE OF COLORADO, *County of Arapahoe.* } *ss:*

Henry Goodridge, of lawful age, being first duly sworn, says that he is one of the plaintiffs above named; that he has read the foregoing replication and knows the contents thereof, and that the same is true of his own knowledge.

[SEAL.] HENRY GOODRIDGE.

Subscribed and sworn to before me this 10th day May, A. D. 1889.

A. W. HILLE,
Notary Public.

My commission expires Aug. 27, 1892.

(Indorsed:) No. 2237. U. S. circuit c't. Henry Goodridge *et al.* against The Union Pacific Railway Company. Replication to plea of statute of limitation. Filed May 15, 1889. William A. Willard, clerk. Sampson & Millett.

62 And afterwards and on, to wit, the 31st day of May, A. D. 1889, the same being one of the regular juridical days of the

May term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial; Verdict for Plaintiff-.

HENRY GOODRIDGE and HIRAM MARFELL *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 2237. Action for Damages.

At this day come the said plaintiff-, by Byron Millett, Esq., their attorney, and the said defendant, by Willard Teller, Esq., its attorney, also comes; and thereupon comes a jury, to wit, T. C. Jones, William Kimball, Joshua S. Lesher, T. J. Shandel, Milton H. Dayton, V. Divinney, Nicholas Ennis, H. H. Suttle, H. W. Hallett, John Q. Day, Alonzo D. Locke, J. C. Dedisse, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence; and thereupon comes the evidence.

And during the trial on this day John C. Dedisse, one of the said jurors sitting in this cause, comes and informs the court that he is sick and unable to longer sit as a juror, and counsel for the parties to this cause, being advised in the matter, consent and stipulate that the said juror be discharged from further service in this cause and agree that the trial may and shall proceed to verdict with the said eleven jurors remaining.

63 And thereupon it is considered by the court that the said Dedisse be discharged from further service as a juror on the trial of this cause.

And the said remaining jurors, having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this day come again the said jurors and on their oaths do say they find for plaintiff- in the sum of five thousand one hundred and eighty-four dollars and thirty cents.

And afterwards and on, to wit, the 5th day of May, A. D. 1889, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause a certain stipulation as to bill of exceptions, and the said stipulation is in words and figures as follows, to wit:

Stipulation as to Bill of Exceptions.

In the Circuit Court of the United States, District of Colorado.

HENRY GOODRIDGE — HIRAM MARFELL *vs.* THE UNION PACIFIC RAILWAY COMPANY. }

64 It is hereby stipulated that for all the purposes of appeal or writ of error, as well as for motion for new trial, & especially for the purposes of a bill of exceptions, the testimony taken in

the case of E. R. Taggart, together with all objections, rulings, & exceptions made or taken to the testimony, also the instructions given by the court to the jury & those asked by the def't in said case, together with exceptions taken to the giving & refusing of such instructions, shall be taken as though all such testimony had been given & all objections made & exceptions taken in this cause & the bill of exceptions shall be made up & may be signed by the judge presiding at the trial of Taggart case & filed as a bill of exceptions in this case precisely & in all respects as though such testimony had been given, objections made, exceptions taken thereto, & as though the instructions given & refused *when* given & asked & refused & exceptions taken on the trial in this case.

BYRON MILLETT &
PATTERSON & THOMAS, *For Pl'ff-.*
TELLER & ORAHOOD,
Att'ys for D'f't.

(Indorsed:) 2237. In circuit court. Henry Goodridge, Hiram Marfell *vs.* The U. P. R'y Co. Stipulations as to bill of ex., &c. Filed Jun- 5, 1889. William A. Willard, clerk. Teller & Orahood, att'ys for def't.

65 And afterwards and on, to wit, the 6th day of July, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Judgment; Bill of Exceptions in 90 Days, etc.

HENRY GOODRIDGE and HIRAM MARFELL *vs.* THE UNION PACIFIC RAILWAY COMPANY. } 2237. Action for Damages.

At this day come the said plaintiffs, by Byron Millett, Esq., their attorney, and the said defendants, by Willard Teller, Esq., its attorney, also comes.

And the motion of the said defendant for a new trial herein, coming on now to be heard, is submitted to the court, and, the court being now sufficiently advised in the premises it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiffs and against the said defendant for the said sum of five thousand one hundred and eighty-four dollars and thirty cents ($5,184.30) and the said plaintiffs' costs to be taxed.

And day until ninety (90) days from this day is allowed the said defendant, within which time to file its bill of the exceptions reserved by it upon the trial of the issues herein joined.

66 And supersedeas bond upon writ of error to the Supreme Court shall be in the sum of eight thousand dollars ($8,000.00).

And thereupon and on the same day, to wit, the 6th day of July, A. D. 1889, judgment was duly entered on the judgment book of said court in said cause in pursuance to the statute and rules of court in words and figures as follows, to wit:

Judgment.

HENRY GOODRIDGE and HIRAM MARFELL
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2237. Action for Damages.

On this 6th day of July, A. D. 1889, the same being one of the regular juridical days of the May term, A. D. 1889, of said court, there being present the Honorable Moses Hallett, district judge—

It is considered by the court that the said plaintiff- do have and recover of and from the said defendant five thousand one hundred and eighty-four dollars and thirty cents ($5,184.30), their damages by occasion of the premises in their complaint mentioned, in form aforesaid assessed, and their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

67 And afterwards and on, to wit, the 2d day of October, A. D. 1889, came again the said defendant, by its attorneys aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of this cause and its bond on writ of error, and sued out of said court a writ of error and a citation to the Supreme Court of the United States; and the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

68 In the Circuit Court of the United States, District of Colorado.

HENRY GOODRIDGE and HIRAM MARFELL, Plaintiffs,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Be it remembered that heretofore, to wit, on the 31st day of May, 1889, this cause coming on for hearing and trial before the court, plaintiffs, to maintain the issues in their behalf, called as a witness Thomas Woods, who, being first duly sworn, gave evidence tending to show that he was manager of the Jackson Coal Company, and was doing business for that company on the 1st day of November, 1885, and from thence to the 1st day of August, 1887; that said coal mines were situate at Canfield, Colorado, about 36 miles from Denver, and as the road ran at the time stated the Jackson mines were the nearest to Denver; that from the 1st day of November, 1885, to the 1st day of August, 1887, it transported from said mines to Denver over the Union Pacific Railway Company's line 20,539 tons and 1,350 pounds at a rate of $1.00 per ton.

On cross-examination the witness gave evidence tending to show that the D., U. & P. Railroad Company's line of road ran across the

Jackson mine, and that the rate charged by that company was the same as charged by the defendant; that these rates were the
69 same at all times, except when there was a cut in rates, and, so far as the witness knew, is the same rate still, and that he never shipped any coal over the D., U. & P.

And the plaintiffs, to still further maintain the issues in their behalf, called Henry Goodridge, who, being first duly sworn, gave evidence tending to show that he was one of the plaintiffs in the suit; that the other plaintiff is Hiram Marfell; that at the time mentioned in the complaint he and Marfell were partners in the coal business; that they were, in 1885, and are, at time of suit, coal dealers at Erie, Colo., as alleged in the complaint; that from October 31st, 1885, to August 11th, 1887, plaintiffs shipped over defendant's line from Erie 12,961 tons of coal; that up to the 16th day of July, 1887, the amount was 12,812 tons and 1,015 pounds, and that up to the 11th of August 148 tons more was shipped, making in all 12,961 tons, and that he paid therefor for carriage $1.00 per ton, and that the mines are located, with reference to the Marshall mine, as stated in complaint, and that Erie is off the main line of defendant's road.

On cross-examination witness testified that there was another railroad company doing business in the immediate locality, the D., U. & P., a short distance from the mines from which the plaintiffs got their coal; that the track of this D., U. & P. was about 200 yards from plaintiffs' mines; that it was doing business there prior to November, 1885, and ever since; that he had understood the rates over that road to be $1.00, and, so far as he knew, to continue at that rate.

And the plaintiffs, to still further maintain the issues in their behalf, called as a witness E. R. Taggart, who, being first duly sworn, gave evidence tending to show that he resided in Denver and had been engaged in the coal trade for seven years, and that he had been handling and selling the output of the Fox Coal Company from No-
70 vember, 1875, to the time of the beginning of this suit continuously, purchasing the coal at the mine and paying the freight from the mine, a few miles back of Boulder, at Marshall station, and on the same vein as the Marshall, and on one of the branches of defendant's road. There are two branches, both belonging to the defendant, and there is no other way of shipping, except over one of these branches.

That he knows the Marshall Consolidated Coal Company, and that said company and plaintiff- ship their coal from the same station, and were so doing from the month of November, 1885, until the time this suit was brought, and that plaintiff- paid $1.00 per ton during that time, and that he shipped during that time 23,593 tons up to the latter end of July, 1885. Witness then gave the amounts for all of the months, and stated that for all this amount he paid $1.00 per ton freight to defendant, and that at the rate of 40 cents per ton it amounted to $9,437.20, and that the defendant rendered its bills to the agent of the Marshall Consolidated Coal Company at $1.00 per ton and paid back to said last-mentioned company 40 cents per ton, and that the first official notice plaintiff- had of the

rebate was when the commission appointed to investigate defendant's affairs was here; that thereupon he wrote to the president of defendant, and also to T. L. Kimball, who was the general traffic manager and official head of defendant.

Plaintiff here offered in evidence plaintiffs' letter to T. L. Kimball and Kimball's reply, to which defendant's attorneys objected, since the demurrer to the second answer had been sustained, and any statement of the way in which the defendant has acted relating to that defense shall be excluded because immaterial, irrelevant, and incompetent; which objection was by the court overruled and defendant then and there excepted.

The letters were then read as follows:

71 "OMAHA, *Aug.* 18, 1887.

E. R. Taggart, Esq., care Fox Mining Co., Denver, Colo.

DEAR SIR: Vice-President Potter has handed me a communication from yourself to our president, dated the 1st instant, with request that I reply to it, as it relates to a matter with which he is not personally familiar.

As the Marshall contract to which you refer was made under circumstances entirely dissimilar to those existing between the Fox Company and the Union Pacific, neither General Manager Callaway nor President Adams supposed they were making an illegal or unjustly discriminating agreement against your company when it was executed.

It is my impression that the allowance of forty cents per ton referred to on Marshall coal was limited to its Denver deliveries, and was made in consideration of the Marshall Company's agreement to furnish our company coal for its own use at not exceeding $1.25 per ton, which was then costing us about $1.50 per ton to mine, and commercial coal at not exceeding $1.40 per ton at a time when other producers of coal asked us $1.60 and upwards.

Another important consideration and inducement to make this contract was the compromise and settlement of a claim against our company for some sixty-odd thousand dollars. Under these circumstances I fail to see any good ground for your claim.

In respect to your charge that you had been discriminated against in the supply of empties I have no information, and can only say it is denied by our operating department, and that no orders
72 to that effect were ever given by the management of this company.

Yours truly,

(Signed) THOS. L. KIMBALL.
G. T. M."

"DENVER, COL., *Aug.* 20, 1887.

Thos. L. Kendall, U. P. R. R.

MY D'R S'R: I have carefully considered the contents of your f'v'r dated 18 inst., and in reply thereto beg to say that I am quite unwilling to concur in the reasons assigned for refusing the return of

40c. per ton from the beginning to the ending of your contract with the Marshall people. The conditions of shipment are identical in every respect, and information from the very highest legal sources here assure me that the contract in question was without warrant and clearly in violation of law. Of the principle which is advanced to sustain your position should obtain what is to hinder you from making a rebate large enough to bankrupt every coal mine in northern Colorado aside from the Marshall? Moreover, I fail to perceive any justice or equity which will compel me to share in your loss by reason of the compromise and settlement to which you refer. My shipments from the Fox mine or Marshall for the period embraced in my claim aggregate some 2,000 cars. Your freight bills without a single exception have always been promptly paid on presentation, and all I ask is to be paid back the difference between — of the Marshall and Fox mines to Denver alone.

It only remains to add that I am disposed to concede a reasonable time for you to maturely consider my demand before taking steps to legally enforce it; hence shall be pleased to hear from you
73 on or before the 1 proximo.

(Signed) E. R. T."

And, further, that the commission spoken of was here in June or July, 1887; that before that time he had inquired for the purpose of finding out what arrangement did exist between the defendant and the Marshall Company from the only source he could hear of—from the collector of defendant's bills; that the name of such collector was Spanger, and he was its regular collector; and, further, that he not only made inquiries of the said collector, but witness himself occasionally received the bills of the Marshall Company by mistake, and the bills were $1.00, the same as his own.

The attorney for plaintiffs then asked: "Did you get any information from this collector?"

To which attorney for defendant objected, and plaintiffs' attorney proceeded:

"Q. You need not state what he said; state whether you got any information from him on this subject.

A. No satisfactory information.

Objection: It seems to me to follow logically if this agent was not an agent to make declarations he cannot bind us by his refusal.

The COURT: This is a question of diligence on the part of the plaintiff- to ascertain the facts; certainly there is no objection to his stating whether he made inquiry or whether he obtained information.

Mr. TELLER: He is trying to make out that we concealed the fact. Now, concealment of that kind must be an affirmative act. He has undertaken to show this man made declarations. It follows logically, if a man's declarations is an evidence in respect to whether we have concealed or not, his refusal—consequently that is inadmissible.

74 The COURT: I think he is entitled to say whether he got any information from him upon this subject.

Mr. Teller excepts and says: "I don't think that he is such an agent as that he can bind the company either by affirmative acts or declarations or failure to act or declare."

Q. Was this collector of whom you spoke the collector of the company from all the coal dealers?

A. Yes, sir.

Q. State whether you ever made any inquiry from any agents of the Marshall Consolidated Coal Company as to their rates during this time.

A. No; there were others shipping who like myself were paying a dollar.

That there were also repeated efforts made by other shippers, and that he made inquiry of the collector, who had just about as much authority as any of the rest, and that he (plaintiff) made no inquiries of the officers or agents of the Marshall Company about the rebate.

(By plaintiffs' attorney:)

Q. "Had you any knowledge of the existence of this special rate to the Marshall Company prior to the disclosures before the commission?"

To which defendant's attorney objected because it is immaterial and incompetent; which objection was by the court overruled, and defendant, by its attorney, then and there excepted, and the witness answered:

A. "I knew nothing about the rebate they were getting until disclosed by the commission," and that his letter was written to defendant's officer as soon as he returned to town immediately after the sitting of the commission, and that he knew of two other coal dealers making inquiries as to the rates had by the Marshall Company.

75 On cross-examination the witness gave evidence tending to show that in 1882, when he commenced dealing in coal from the Fox mines, his business had been increasing—supposed it had increased 25 per cent.—and that during the first two years he shipped several thousand tons of coal over defendant's road, paying $1.25 per ton for a period of that time and the rest of the time $1.00 per ton; paid $1.25 for perhaps a year, and that the rates paid by him during that time were the same as paid by everybody else, and that there was nothing exceptional, to witness's knowledge, about the $1.25 per ton rate; that he (witness) continued to ship coal at $1.00 per ton from 1882 up to 1887 and paid $1.00 per ton from the Fox mine and knew no company or person that got a less rate than $1.00 per ton, except the Marshall Company, and knew that defendant set up in bar of plaintiffs' claim a contract they had with the Marshall Company in consideration of the Marshall Company supplying them with coal at a given price—much below the

price at which they could mine it or get it out of the mines—and, further, in settlement of an old lawsuit they had, and that witness protested against that sort of business, and that witness never heard that the amount of coal thus to be furnished was a stipulated amount, and that witness knew nothing about it, except what Mr. Kimball said in his testimony before the congressional committee, and that what said Kimball did say was "it is my impression that the allowance of 40 cents on Marshall coal is limited to its Denver delivery made in consideration of the agreement of the Marshall Company to furnish our company coal for its own use." The witness further gave testimony showing that Kimball's testimony as to its own uses and not exceeding $1.25 per ton, which was then costing plaintiffs and others about $1.50 to mine, and commercial coal at not exceeding $1.40 per ton at a time when other producers
76 asked $1.60 per ton—that was making a difference of from 20 to 25 cents per ton on every ton of coal than what it cost.

Defendant's counsel here asked: "As a matter of fact, do you know what it did cost to get out a ton of coal and put it on the cars at the Marshall or Fox mine?"

To which plaintiffs, by their counsel, objected. The defendant's counsel claimed that the good faith of the company in making the contract with the Marshall Company was in question; but the court sustained the objection, and the defendant, by its counsel, then and there excepted.

The witness also gave evidence tending to show that he knew all parties shipping coal to Denver at that time from 1882 to 1885; knew no other rates than that of the $1.00 and $1.25 per ton before mentioned, and that from 1882 to 1885 there was no trouble between plaintiffs and defendant about rates, and that his reason for commencing suit was what was disclosed before the congressional commission, and that his sole claim was founded on the fact that the defendant had made a distinction between witness and the Marshall Company, and that he (witness) did not think the defendant had acted in good faith with him in giving a 60-cent rate to the Marshall Company and charging him $1.00, and that it deprived him of profits, and that he lost the sale of a large number of cars of coal, and that in the judgment of the witness the defendant's defense, consisting of a contract with the reasons alleged for the contract, was not satisfactory to him, and that was the reason why he brought suit to recover back the 40 cents per ton. The witness also stated that his reasons for bringing suit were contained in his letter of July 25th, 1887, to Charles Francis Adams, and thereupon the letter was read, as follows:

"DENVER, *July 25th*, 1887.

77 Honorable Charles Francis Adams, president Union Pacific railroad, Boston, Mass.

MY DEAR SIR: The recent investigation of this city of the U. P. commission has disclosed the fact that your company have continuously allowed a rebate to the Marshall Consolidated Mining Com-

pany from November, 1885, to the present time. I represent and purchase my coal from the Fox Mining Company, which has property and operations immediately adjoining that of the Marshall. The conditions of shipment are identical in every respect; it is not a competing point; your two branches control the output from the Marshall station, and I am advised by the most competent legal authority here that such rebates and discriminations are wholly unlawful if exercised to my pecuniary disadvantage, which certainly has been the case. In this view I respectfully demand of the Union Pacific railroad the full amount of such rebates as have been awarded to the Marshall Consolidated Coal Mining Company for the period above stated, and further beg to notify you that I shall hereafter — transported at the same rate as that of the Marshall Consolidated Coal Mining Company. My receipts embracing the period *about* stated aggregate over two thousand cars. I trust you will realize the justice of my claim and take such immediate action in the premises as will avoid litigation. I beg only to add that for a satisfactory adjustment of my claim I am willing to waive any additional demands by reason of a failure in the supply of cars. It is due to truth to say that my sales would have been augmented to the extent of five hundred — or an equitable division had been made between the companies.

78 A prompt answer is respectfully solicited."

The plaintiffs further introduced ROBERT H. RUBIDGE as a witness, who, having been duly sworn, gave evidence tending to show that he had been the treasurer and assistant secretary of the Marshall Consolidated Coal Mining Company since November, 1885, the date of its organization.

The witness was then asked if he could state the amount of coal shipped by the Marshall Company to Denver between November 1st, 1885, and August 1st, 1887, and, having said he could, was asked to state that amount.

To which defendant's counsel objected that it was incompetent and immaterial.

The court, thereupon remarking that plaintiff was bound to show that the Marshall Company was a competitive dealer and his right to recover was on the ground that there was an unjust discrimination, overruled the objection; to which defendant, by its counsel, then and there excepted.

And witness stated that from November 1st, 1885, to May 1st, 1887, which was all he could give, there was shipped from the Marshall mine 79,970 tons and from the Louisville mine 73,067 tons of coal, and that each of these places are about the same distance from Denver on the defendant's road; that the amount of coal shipped from May 1st, 1887, to August 1st, 1887, would be small, say something like 3,000 tons per month, and that there was shipped to Denver from November 1st, 1885, to August 1st, 1887, 67,863 tons from the Marshall mine. The balance was shipped to other places. The freight on this amount to Denver was $1.00 per ton, and the bills were made out and presented at that rate, and 40 cents per ton

was paid back to the Marshall Company. The amount of money then paid back up to August, 1887, was $27,145.33, and noth-
79 ing was paid after that time, as the contract was then cancelled. The witness further stated that they did not publish the contract with the defendant any more than they did any of the other business, and that they did not publish any of their business, and that he did not know of an instance when knowledge of the existence of the contract was given to any of their competitors.

And witness was then asked: "Do you know of any inquiries having been made by competitors if the office of your company as to its existence?" And also to state whether any inquiries were made of or complaints made to any of the officers of his company.

Which was objected to by defendant's counsel because what the officers of that company did or did not do could not render defendant liable, and that the evidence was incompetent; which objection was by the court overruled, and the defendant then and there excepted.

The witness answered: "I don't know of any. No direct inquiries were made. Goodridge said he knew he was working against an embargo of 50 cents and we had the advantage of 50 cents a ton against him, and asked me if it was so, and I told him it was not."

Witness was then asked: "Did you know of the existence of this contract prior to the meeting of the Pacific commission?"

Which was objected to by the defendant's counsel as immaterial and incompetent; which objection was overruled, and defendant then and there excepted.

The witness answered: "No, sir; I did not. I was not asked by any one nor thought about it." And further that the other officers of the company were George C. Lyman, manager; then E. F. Burton succeeded him, and that Lyman had something to do with the agreement with the defendant, and he expected J. B. Chaffee also had something to do with it, and that neither the defendant or any of its officers were stockholders in the Marshall Company.

80 On cross-examination the witness gave evidence tending to show that it was his duty to keep an account of coal mined and whether it was shipped or used and to whom it was shipped; that the regular schedule rates of defendant to Denver to the mine was $1.00 per ton.

The question was then asked witness: "You say when the accounts were made up you were paid back forty cents per ton; why was this done?" And, the witness having stated that the consideration for doing it was in writing, plaintiffs' counsel objected to the evidence as immaterial and incompetent; the objection was overruled and plaintiffs' counsel then and there excepted. And the witness said: "Well, that was done in consideration of our giving an indemnity bond. Our company gave an indemnity bond protecting the Union Pacific from all claims on account of a damage suit against them, amounting to about $65,000.00, for which they had attachments on some of the rolling stock and ties and half a mile of track of the Denver, Western & Pacific."

Q. "Was there anything else that entered into that consideration?"

A. "We were to give them coal at costs for the company's use, and not to exceed at any time $1.25 per ton, and also to give them coal for commercial use at not exceeding $1.40 a ton—that is, for Kansas but not for Denver."

The witness further stated that for coal going to Kansas they were to pay $1.40 per ton only and for the use of defendant company $1.25 per ton only, and if the costs was less than that they were to get it at cost; that under that contract the Marshall Company furnished to the defendant for its own use on its locomotives from November 1st, 1885, to March
81 inclusive, 1887, 52,078 tons, and witness thought about an equal amount for commercial use in Kansas.

The witness then gave evidence tending to show that the defendant paid to the Marshall Company for this coal different prices; for the first few months $1.75 per ton, and latterly $1.25, and part of the time $1.60 per ton. The witness was then asked to tell how it came to be $1.75 and $1.60 instead of $1.25, which was objected to by plaintiffs' counsel, and the objection sustained; to which ruling defendant, by its counsel, then and there excepted. The witness was then asked: "How much did it cost to get out coal and put it on the cars for the use of the Union Pacific in its engines, and also for its use in commercial use in Kansas?" To which plaintiff-, by *its* counsel, objected, and the court sustained the objection; to which ruling defendant, by its counsel, then and there excepted.

Defendant's counsel then offered to show by the witness that the cost of getting out this coal which they were obliged to furnish the Union Pacific under the contract was largely in excess of what they got, and that by reason of that they paid for the defendant, through the contract and by furnishing the coal, a larger amount of money than they got back in rebates, so that they actually paid to the defendant at least $1.00 per ton for every ton carried by defendant; but the court refused to allow such evidence to be given or received, and thereupon counsel for defendant then and there excepted to such refusal.

Witness further testified that he did not obtain from Mr. Goodridge any information about the contract on account of anything said between witness and any officer of defendant about keeping it silent, and that he knew of no demand made by the defend-
82 ant's officers that it should be kept silent; that he had the rates from Marshall to Denver prior to 1885, and that the only rates one coal from Marshall to Denver from 1882 to 1885 of which he had knowledge was $1.25, and that that was the only rate had by parties prior to 1885.

The witness also stated that the claim for which the Marshall Company gave an indemnity bond arose out of the building of the line of railroad of the Denver, Western & Pacific through the Marshall property, cutting through into the Marshall Company's mine and causing it to take fire, with loss of tools, &c., so that that part of

the mine has never been mined since, and the claim was made against the Denver, Western & Pacific, and this company succeeded to that and gave the bond of indemnity against that claim, and that the claim had been in litigation for some years, and that the suit had been released when the bond of indemnity was given.

The witness then stated that Mr. Langford and Joseph M. Marshall were the owners of the Marshall mine, and the witness was then shown a release, which he stated had been given by the said owners of the mine when the bond of indemnity was given, which release was in words and figures as follows:

"Know all men by these presents that we, the Marshall Coal Mining Company, Augustine G. Langford, and Joseph M. Marshall, of Denver, Colorado, for and in consideration of the sum of one dollar to us each in hand paid by the Union Pacific Railway Company, the Denver, Marshall & Boulder Railway Company, receipt whereof is acknowledged, do hereby release and forever discharge the said Union Pacific Railway Company and the Denver, Marshall & Boulder Railway Company and the successors and assigns of them and each of them of and from all actions and causes of action,
83 suits, controversies, claims, and demands whatsoever for or by reason of any cause, matter, or thing arising out of the construction of any railroad across the property of either of us in Boulder and Jefferson counties, Colorado.

Witness our hands and seals this twenty-ninth day of October, A. D. 1885.

(Signed) THE MARSHALL COAL MINING CO., [SEAL.]
By A. G. LANGFORD, *Manager*. [SEAL.]

[Corporate Seal of Marshall Coal Mining Company.]

AUGUSTINE G. LANGFORD.
JOSEPH M. MARSHALL."

Defendant's counsel offered the release in evidence, but the court then and there excluded the same and refused to allow it to be read, and thereupon the defendant's counsel then and there excepted to such refusal and rejection of such evidence.

On redirect examination by plaintiffs' counsel the witness gave evidence tending to show that at the time of the agreement with defendant and the Marshall Consolidated Coal Mining Company the Marshall Company had an attachment on the engines and rolling stock of the Denver, Western & Pacific, which attachment was inherited by the Marshall Consolidated Company from the former company, known as the Marshall Coal Mining Comyany, and that all the litigation was against the Denver, Western & Pacific Railway Company and not against the defendant.

And on recross-examination the witness stated that he knew the claim spoken of existed and that they had to give the indemnity bond as a part consideration of the contract and before they could get the contract.

The plaintiffs then called D. S. Woods, who, having been sworn, gave testimony tending to show that he was the manager of the Jackson coal mine and engaged in selling coal in Denver;
84 that the mines of his company are situate at Canfield, 24 miles from Denver by the Utah & Pacific road and about 36 miles from Denver by the defendant's road, and was engaged in shipping coal over defendant's road from November, 1885, to August 1st, 1887, and was paying a rate of $1.00 per ton and made inquiries during that time of Thomas L. Kimball, an officer of defendant, with reference to the rates which the Marshall Consolidated Coal Mining Company was getting on coal. The inquiry was made about the month the Pacific commission was here, a short time before; also made inquiry of D. O. Clarke, superintendent of the coal department of the Union Pacific. Clarke and Kimball were together; that he told them we all ought to be put on the same basis as the Marshall Company, and that he thought from the way they were selling coal they were getting a lower rate; that the reply was that they were not getting any less rate than others were and all were on the same basis, and that witness had also before that time spoken to the defendant's general agent, Keeler, about it, and that his reply was that he knew nothing about it, and that the first personal knowledge that witness had of the fact of the rebate to the Marshall Company was when the Pacific commission was here, and that a short time after the commission was here witness had a talk with T. J. Potter, the general manager of the defendant, and that Potter said he knew of the contract after he had been in office five or six weeks and said he came to Colorado to cancel it. He said it was an unjust thing.

To this answer and to that part of it that states what Potter said about its being an unjust thing defendant, by its counsel, objected and asked to have it stricken out, which was refused by the court; to which refusal defendant then and there excepted.

85 On cross-examination the witness gave evidence tending to show that the Fox mine, where plaintiff got *his* coal, is by the defendant's road nearer to Denver than the Marshall mine; that the Jackson mine is situate on the railroad of the Utah & Pacific and the defendant, and that the former road had been running for four years, and that he had shipped over defendant's road since 1879 and had never shipped over the road of the Utah & Pacific, and during that time there had been three different rates on coal to Denver; first, $1.25; then on the opening of the Utah & Pacific line the roads got into a fight and it dropped to 25 cents. This rate did not last long, and it was then fixed at $1.00. The rate of 25 cents lasted but a few months, and since the restoration to $1.00 the same has continued the same on both roads, $1.00 per ton, and that the rates from the Jackson, Canfield, and Marshall mines was the same, though there is eight or ten miles difference in the distance to Denver; and, further, that, so far as witness knew, no other person or company got any rebate from the schedule rate of $1.00 per ton except the Marshall Consolidated Company; that there were in all in that vicinity and within ten or eleven miles eight

mines beside the Marshall and all shipping coal to Denver, all of whom, so far as witness knew, were paying $1.00 per ton.

Plaintiffs also introduced HENRY GOODRIDGE as a witness, who, being sworn, gave testimony tending to show that he was engaged in selling coal from the Stewart mine from November, 1885, to August, 1887, and that the Stewart mine is located at Erie, about ten miles from the Marshall mine, and that in 1886 he made inquiries of Mr. Keeler, defendant's general agent, as to the rates the Marshall Company was getting, and Mr. Keeler answered him that
86 there was no different rate given, and said that they were all treated alike, and also had a conversation with Kimball and Clarke about a month before the Pacific commission met, and they said we were all getting the same rate.

Witness was here asked if he also had a conversation with Rubidge, the treasurer and secretary of the Marshall Consolidated Company, as to rates, and having answered that he did, and that it was about July, he was asked to state what Rubidge said, to which the defendant, by its counsel, objected that the evidence was incompetent and the defendant was not bound by what Rubidge said; but the court overruled the objection, and the defendant then and there excepted.

And the witness said he told Rubidge he was satisfied they were getting lower rates than we were, for they could not sell coal at the price they did unless they got it. He said we were all paying the same. The witness also stated that he had a conversation with T. J. Potter, the general manager of defendant, and Mr. Woods and myself told Mr. Potter that we would make out a claim for the difference between what the Marshall Company had paid and what we had paid, for we considered that we were entitled to the 40 cents, and he said, "Well, wait two or three days and I will let you know what I will do;" that Potter said he was surprised at what Kimball had told them, and that he had been there but a short time and was not responsible for what had been done before.

On cross-examination the witness gave evidence wending to show that he had been in the coal business in Denver about 12 years, getting coal from Erie and mines in that vicinity, and paid from $1.25 t- $1.00 per ton; that the Utah & Pacific railroad had been in operation and adjacent to the mines from which witness got coal since
1884 at least; never shipped over the Utah & Pacific; rates
87 the same on both roads.

Thereupon the plaintiffs offered, for the purpose of showing that the witness Rubidge was mistaken as to the pendency of suit against the Denver, Western & Pacific Railway Company at the time of the making of the contract by the Marshall Company with the defendant, — that the Denver, Western & Pacific Railway Company had been in the hands of a receiver since October 3rd, 1882. Defendant objected; objection sustained. This was all the evidence given in the case.

The case was thereupon submitted to the jury, who returned a verdict for $5,184.30.

The defendant thereupon filed a motion for a new trial; which motion is in words and figures as follows, to wit:

"Now comes the defendant in the above-entitled action and moves the court to set aside the verdict heretofore entered herein and grant a new trial—

(1st.) Because the court erred in admitting incompetent, irrelevant, immaterial, and improper evidence offered by the plaintiff-against the objection of the defendant.

(2nd.) Because the court erred in rejecting competent, relevant, material, and proper testimony offered by the defendant.

(3rd.) Because the court erred in refusing to instruct the jury to find their verdict for the defendant herein, as requested by the defendant.

(4th.) Because the court erred in instructing the jury on its own motion.

(5th.) Because the court erred in refusing to instruct the jury as requested by the defendant.

(6th.) Because the court erred in instructing the jury as requested by the plaintiff-.

88 (7th.) Because the verdict is contrary to law and the evidence.

(8th.) Because the verdict is against the weight of the evidence.

(9th.) Because there is no sufficient evidence to sustain the verdict.

(10th.) The verdict is excessive.

(Signed) TELLER & ORAHOOD,
Attorneys for Defendant."

And said motion for a new trial having come on for trial before the court the said motion was denied; to which the defendant, by its counsel, then and there excepted, and judgment was thereupon entered for the plaintiff-.

And because the foregoing matters and things do not fully appear of record it is ordered that this bill of exceptions be signed and sealed and made a part of the record in this case, which is done accordingly.

MOSES HALLETT, [SEAL.]
District Judge.

I am satisfied with this bill of exception.

BYRON MILLETT.

(Indorsed:) 2237. Henry Goodridge, Hiram Marfell *vs.* Union Pac. R'y Co. Bill of ex. Filed Oct. 2, 1889. William A. Willard, clerk.

And the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

89 THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that the Union Pacific Railway Company, as principal, and Willard Teller and Samuel N. Wood, as sureties, are held and firmly bound unto Henry Goodridge and Hiram Marfel in the full and just sum of eight thousand dollars, to be paid to the said Henry Goodridge and Hiram Marfel; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of September, in the year of our Lord one thousand eight hundred and *eighty* eighty-nine.

Whereas lately, at the May term, A. D. 1889, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Henry Goodridge and Hiram Marfel, plaintiffs, and The Union Pacific Railway Company, defendant, judgment was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Goodridge and Hiram Marfel, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the 14th day of October next:

Now, the condition of the above obligation is such that if the said The Union Pacific Railway Company shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

90 THE UNION PACIFIC RAILWAY COMPANY, [SEAL.]
By WILLARD TELLER, *Its Attorney-in-Fact.*
WILLARD TELLER. [SEAL.]
SAMUEL N. WOOD. [SEAL.]

Approved:
MOSES HALLETT, *Judge.*

I consent to the filing and approval of this bond Oct. 2nd, 1889.
BYRON MILLETT.

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Willard Teller and —— ——, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name—that is to say, as to

Willard Teller, eight thousand dollars; as to Samuel N. Wood, eight thousand dollars—over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

WILLARD TELLER.
SAMUEL N. WOOD.

Subscribed and sworn to before me, at Denver, this 28th day of September, A. D. 1889.

CHARLES M. KENDALL,
Notary Public.

My commission expires Aug. 16, 1892.

91 (Indorsed:) Gen. No., 2237. Circuit court of the United States, district of Colorado. The Union Pacific Railway Company *vs.* Henry Goodridge and Hiram Marfel. Bond on writ of error, $8,000. Filed this 2d day of Oct., A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error is next hereto attached, to wit:

Writ of Error.

92 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between Henry Goodridge and Hiram Marfel and the Union Pacific Railway Company, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the 114th year.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT, *Judge*.

93 [Endorsed:] Gen. No., 2237. Circuit court of the United States. The Union Pacific R'y Co., plaintiff in error, *vs.* Henry Goodridge *et al.* Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 2nd day of October, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Teller & Orahood, attorney- for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, *District of Colorado*, } *ss*:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this fourth day of October, 1889.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

The defendant having served this writ of error by lodging a copy thereof for the adverse party in the clerk's office within sixty days, Sundays exclusive, after the rendition of the judgment herein and having given the security required by law on the issuing of the citation, this writ is therefore a supersedeas. (By consent of plaintiffs.)

Teste:

WILLIAM A. WILLARD, *Clerk*.
By F. W. TUPPER, *Deputy Clerk*.

94 And the said citation is next hereto attached, to wit:

Citation.

95 Citation, U. S. circuit court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to Henry Goodridge and Hiram Marfel, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Union Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 2nd day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

MOSES HALLETT, *Judge.*

96 [Endorsed:] Gen. No., 2237. Circuit court of the United States, district of Colorado. The Union Pacific Railway Company, plaintiff in error, *vs.* Henry Goodridge and Hiram Marfel, defendants in error. Citation. Filed in circuit court of the U. S. this 4th day of October, A. D. 1889. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Teller & Orahood, attorneys for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

On this 4th day of Oct'r, A. D. 1889, we accept service of within citation for def'ts in error.

T. M. PATTERSON,
C. S. THOMAS,
Att'ys for Defendants in Error.

97 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete

transcript and copy of the record and proceedings heretofore filed or had and entered in said court and in a certain cause lately in said court pending, wherein Henry Goodridge and Hiram Marfell were plaintiffs and The Union Pacific Railway Company was defendant, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fourth day of October, A. D. 1889.

{ Seal United States Circuit Court, District of Colorado. }

WILLIAM A. WILLARD, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Endorsed on cover: Case No. 13,811. Colorado C. C. U. S. No. 211. The Union Pacific Railway Company, plaintiff in error, *vs.* Henry Goodridge and Hiram Marfel. Filed October 18, 1889.

Office Supreme Court U. S.
FILED.
APR 27 1893
JAMES H. McKENNEY,
CLERK.

UNITED STATES *v.* CURTNER (11 Saw. 411).

Circuit Court, District of California.

January 18, 1886.

1. RIGHT OF UNITED STATES TO VACATE PATENT TO LAND.—Where the United States is under an obligation to make a title to a portion of the public lands, they have such an interest in the lands as entitles them to maintain a suit in equity to vacate a prior patent improperly issued by mistake to a party not entitled to it.
2. PARTIES TO SUIT.—Where lands have been improperly listed by the officers of the United States Land Department by mistake to the State of California, and the State has subsequently patented them to private parties, the State is not an indispensable party to a suit by the United States against the several patentees to annul such patents. Nor is the party entitled to the lands by right fully vested prior to such listing to the State an indispensable party.
3. SAME.—MULTIFARIOUSNESS.—A bill in equity filed by the United States under circumstances set out in the bill, to vacate the patents to several parties of several distinct parcels of land, the several defendants having no joint interest in any portion of the land, depending upon the same facts and the same evidence, is not objectionable as being multifarious.

Before SAWYER, circuit judge.

Mr. S. G. Hilborn, United States attorney, and *Messrs Shafter, Parker & Waterman*, for the complainant.

Mr. L. D. Latimer, for the defendants.

SAWYER, circuit judge, orally. This is a bill filed by the United States to set aside listings of certain lands to the State of California, and certain patents therefor, issued to defendants by the State.

The ground is, that the lands, listed and patented, are odd sections within the limits of the grant made by the United States to the Central Pacific Railroad Company; that no other right had attached to them at the time of

filing the definite location of the road; that the road having been completed pursuant to the act of Congress the title vested; and that the lands were listed over to the State by mistake, the right of the railroad company to a patent having before the listing fully vested and become perfect.

The State, after such listing over, patented them to the several defendants or their grantors in this case. This suit is brought by the United States, under direction of the attorney general, to annul the listing and these patents on the ground that they were issued by mistake, when there was no right except the bare, naked, legal title left in the United States, and no authority in the officers of the United States to list them over to the State of California.

There is a demurrer to the bill.

In the first point, counsel follow the suggestions in the case of *United States* v. *Minor* (114 U. S. 233), as to whether the right to the lands having already passed out of the United States, the complainants have any interest in the suit. They suggest the points therein indicated, and rely upon them.

I think the United States have such an interest in the lands or that they stand in such relation to them as entitles them to maintain a suit.

Under the allegations of the bill the right to a patent to the lands was fully vested and perfected in the railroad company before the listing to the State. The officers of the Government, therefore, acted wholly without authority in listing them to the State; but they did list them over, and the State has patented them to the several defendants and their grantors, and thereby a conflict has arisen, and the Government recognizes the right of the railroad company. There has been a conflict for years over these

lands, the railroad company seeking a patent. The Government, after a due consideration of the subject, recognizes the fact that these lands belong to the railroad company, but declines to complicate the matter by issuing another patent. It prefers to vacate the title issued, in order that it may give a perfect title, which, I think, is a very proper mode of procedure on the part of the United States. It is much better than issuing another and second patent, thereby complicating the title and leaving the railroad company a long litigation with each individual defendant on its hands. It was through the wrongful acts of the officers of the Government that this conflict arose, and the listing to the State stands in the way of issuing the patent to the proper party. As the wrong resulted from the mistake of the Government officials, the Government of the United States is under obligation to perfect the title for its first grantee. The United States have an interest, therefore, in the litigation, because they are morally and legally bound—although there may be no remedy in the courts against the Government—to see that this title is made perfect, and they, therefore, stand in such relation to the lands in this case as gives them a right to intervene to set aside the listing to the State, and the patents issued in pursuance of such listing in order that they may perform their duty and discharge their legal and moral obligation to the railroad company.

The following authorities, I think, sustain that position: *United States* v. *Hughes*, 11 How. 568; *Hughes* v. *United States*, 4 Wall. 235; *United States* v. *Stone*, 2 *Id.* 535; *United States* v. *Robbins*, 96 U. S. 533.

The United States is an injured party, it being placed in that position where it cannot fulfill its legal obligation. I think that objection, therefore, should be overruled.

The second objection is, that there is a defect of parties

plaintiff—the railroad company not having been made a party.

The railroad company, although it is interested in the land, is not a party to the transaction between the United States and the State of California, and it derived no title from the United States, subsequently, to this transaction. The right of the railroad company was vested and perfected before this transaction. It is not a subsequent claimant. It being no party to the transaction, and not claiming by title subsequent, I think it is not an indispensable or necessary party to the suit. The sole duty to make a title is on the Government. Whether it would be a proper party it is not necessary now to determine. I think that objection should be overruled.

The next objection is, that the State of California should be a party. The State of California has parted with all her interest in the lands, whatever it was, to the defendants in this case, and she now has no interest in them, to be affected. I do not think she is an indispensable or necessary party to this suit. Besides, the State of California cannot be sued. She is not subject to be sued, and could not be made a party. As to whether she would be a proper party it is not necessary to determine, but I do not think the State of California is an indispensable party as to any suit between the United States and her grantees. The United States have no interest in any litigation between the State and her grantees arising out of the transactions between themselves. The demurrer is, therefore, overruled on that point.

It is claimed that the bill is multifarious, in that each of the parties defendant has a separate patent from the State.

These lands were listed to the State under one act. It is possible that they were listed at different times, but it

was all done under one act, and the rights of the railroad company, the moving cause of this suit, are derived from the United States under one act. There are, therefore, two points of title common to all parties. The same question arises as to all of these defendants, and the case of each will be decided on the same issues, and the same testimony.

There is no difficulty, then, in litigating all the questions, and the rights of all the parties in the same suit.

In this matter of multifariousness in equity practice, there is no definite, absolute, unbending rule. It rests very much in the discretion of the court. The litigation in this suit will prevent a multiplicity of suits. A suit brought against each defendant, respectively, would be oppressive to the Government, and to all parties, and be much more expensive to both.

I think the bill is unobjectionable in that particular.

The statute of limitations and that the claim is stale are set up as grounds of demurrer, but they do not appear to be relied upon in the argument. Indeed, nothing is said on these points. The statute of limitations, if applicable as such in equity cases in the national courts, does not apply to the United States.

As to staleness, the railroad company has constantly been pressing its claim before the proper officers, and awaiting for years on the routine of the Land Department of the Government. The Department has been considering it, and the claim having gone through all stages, the Secretary of the Interior has, finally, decided that the company was entitled to the lands, and directed the commencement of this suit. The proceedings have been as expeditious as is usual in such cases, and as the nature of the case admits.

I do not think the charge of stalement will lie in this matter. The case, I think, is within the rule on this point stated in *United States* v. *Minor*, already cited.

The demurrer will, therefore, be overruled, and the defendants allowed till the rule day in March to answer.

149 US 680

Office Supreme Court U. S.
FILED.
APR 1 1893
JAMES H. McKENNEY,
CLERK.

IN THE

The Supreme Court

OF THE

United States.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
HENRY GOODRIDGE AND
HIRAM MARFELL,
Defendants in Error.

Statement of Facts and Brief for Plaintiff in Error.

WILLARD TELLER,
H. M. ORAHOOD,
E. B. MORGAN,
Attorneys for Plaintiff in Error.
JOHN F. DILLON, *Of Counsel.*

C. J. KELLY, PRINTER, DENVER.

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THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
HENRY GOODRIDGE AND
HIRAM MARFELL,
Defendants in Error.

Statement of Facts and Brief for Plaintiff in Error.

The amended complaint sets up the corporate charter of The Union Pacific Railway Company and its operation of a line of railroad from Denver to Erie and Marshall, in Colorado, at which were situated certain coal mines, about the same distance from Denver, (thirty-five miles), Erie being a little less in distance than Marshall, and that the fixed schedule of the railroad company was the same from each place to Denver, to wit: $1 per ton.

That in October, 1885, the plaintiffs, coal merchants, doing business in Erie and Denver, were owners of and operating certain coal mines at Erie, and as partners, shipped from Erie to Denver, on the railroad of defendant and between October 3, 1885, and August 12, 1887, 12,960 tons and 1,625 pounds of coal, for which they paid to the defendant company, $5,184.30, it being at the rate of $1 per ton. That during same time the defendant company carried coal for The Marshall Consolidated Coal and Mining Company from Marshall to Denver, under substantially the same conditions, at the rate of 60 cents per ton; that defendant company thus allowed the Marshall company a rebate of 40 cents per ton, for each ton carried; that the latter company shipped 145,800 tons; that all this was done without the written consent of Railroad Commissioner, of the State of Colorado; that it was done without the knowledge or consent of plaintiffs; that defendant company made special contracts with the Marshall company for shipping and carrying its coal which were not open and allowed to all persons or corporations, including the plaintiffs; that the carriage was done under like circumstances and conditions; that this conduct and these concessions and rebates were fraudulently concealed from the plaintiffs until about August 12, 1887, and that plaintiffs were deceived and misled by these devices and practices. It also charged that the defendant company had allowed and granted other parties, unknown to plaintiff, like concessions and rebates; and, further, that *all* the coal shipped by both

plaintiffs and the Marshall company was of like quality and costs the same to ship and handle, and that such charges, made against plaintiffs, were unreasonable, unjust and extortionate; and that all such overcharges were an unjust discrimination against the plaintiffs. Plaintiffs pray judgment for the sum of $15,552.90, it being three times the amount alleged to have been extorted, at rate of 40 cents per ton for all coal shipped by plaintiffs.

The answer sets up—

First—A general denial of each and every allegation in the complaint.

Second—A special denial of each and every of the things charged in the complaint, especially denying that plaintiffs' coal was shipped under similar conditions and like circumstances with those of the Marshall company.

Third—It set up in substance a second defense, to wit: That, in May, 1880, The Denver, Western and Pacific Railway Company constructed a railroad a portion of the way from Denver to Boulder, and in doing so passed over certain coal land belonging to one Langford and others, and known as the Marshall Mine, but had never paid for its right of way, and in the construction it broke into the said mine and caused great damage by fire in said mine; to recover which the said owners began suit for $65,000, and levied an attachment on the property of said railway company. That afterwards the said Denver, Western and Pacific Railway Company's property was all sold out and passed into the hands of The Denver, Marshall and Boulder Railway Company, which was owned and

controlled by The Union Pacific Railway Company, said property coming to The Denver, Marshall and Boulder Company subject to said attachment. That, prior to October, 1885, The Union Pacific Railway Company was the owner of the capital stock of The Union Coal Company, which said coal company was the owner and lessee of certain coal mines at Erie, Weld County, and at Louisville, in Boulder County, and had been engaged in working the mines and furnishing The Union Pacific Railway Company with coal for its engines, and also engaged in mining coal for sale. That a company known as The Marshall Consolidated Coal Mining Company about that time acquired title to the said Marshall mine, and, by assignment by the said Langford and others acquired title to their claim for $65,000, secured by attachment on the line of railroad, etc., then held by The Denver, Marshall and Boulder Railway Company. That thereupon, on the 13th day of October, 1885, The Union Pacific Railway Company, through its President, caused to be drawn and signed by the President a contract between it and The Marshall Consolidated Coal Mining Company, in which it was recited that, it being for the interest of the Union Pacific company to discontinue the actual working of the said The United Coal Company's mines, and to contract with the said Marshall Coal Company to furnish the railway company with all the coal needed for its own consumption on its road and its branches, not to exceed 50,000 tons per year for the first year, and 100,000 tons for every year thereafter; that there-

fore, in consideration of $1 and in consideration of The Union Coal Company going out of the coal business, and the purchase from the Marshall company by the Union Pacific company of the coal used for its own consumption, at the rate mentioned therein, and in consideration of the rates for transportation of coal therein agreed on, the said coal company agreed to furnish, from said Marshall mine, all coal ordered by the railway company for its own use and consumption and the use of its branches, such amount not to exceed 50,000 tons the first year, and not to exceed 100,000 tons for other years, and to deliver the coal on board the cars of the Union Pacific, at a price not to exceed $1.25 per ton, and at the actual cost of putting it on the cars, and if such cost was less than $1.25 per ton, then at actual cost. And that, so long as the railway company would transport the coal mined by the coal company at rates as low as any other railroad company, it would ship all of the coal mined over said railway company's line to Denver, and also that, on coal thus shipped to Denver, the coal company should pay the regular rate of $1 per ton, unless 200,000 tons were mined and furnished for transportation yearly, in which case a rate of 60 cents per ton should be paid for all coal transported over the railway company's line to Denver, and if the rate is reduced below $1 then the 60-cent rate should be reduced in the same proportion. It was also provid that, if the railway company should order coal in excess of the amounts of 50,000 and 100,000 tons fixed for yearly amounts, then the railway company should pay the cost of mining and putting such coal on the cars plus 50 cents per ton,

except that in no case should the price for mining and loading such coal exceed $1.40 per ton. And it was further agreed that, as a part consideration of the contract that a majority of the capital stock of said coal company should be held for two years, and if the company desired to sell, it should first offer it to the railway company. The contract was sent to the General Attorney of The Union Pacific Railway Company for approval before delivery, and thereupon said attorney prepared a bond of indemnity for the execution by the coal company, indemnifying the railway company against the $65,000 clause on attachment, and on execution of the said bond, and as a part of the transaction, the contract was delivered to the coal company.

To this second defense a demurrer was interposed by plaintiffs, and the Court sustained the demurrer, to which the defendant, by its counsel, duly excepted, the Court giving its reasons for such judgment (fols. 51–57), which reasons will be hereafter set forth and commented upon.

"On the trial before a jury, Henry Goodridge, one of the plaintiffs, was sworn and testified to the partnership, and that they were engaged in shipping coal, from Erie to Denver over defendant's road between October 3, 1885, and August 12, 1887, and shipped 12,961 tons and paid therefor $1 per ton, and from mines about the same distance or a little less from Denver than the Marshall mine. On cross-examination, he stated there was another line of railroad, the Denver, Utah and Pacific, running to Denver, and lying within 200 yards of plaintiff's mine; that it was being operated

prior to 1885, and he understood the rates on that road to be $1 per ton to Denver, and as far as he knew to continue at that rate.

There was also introduced as a witness E. N. Taggart, who gave evidence tending to show that he had been shipping coal from the Fox mine, near the Marshall mine, and on the same vein with it, there being no other road from Marshall to Denver except that of defendant company. That from November 1885, up to latter end of July, 1887, he had shipped over defendant's road to Denver 23,593 tons of coal and paid $1 per ton; that the defendant company rendered bills to The Marshall Consolidated Mining Company at $1 per ton, and paid back 40 cents per ton to the Marshall company.

The plaintiffs then offered in evidence two letters—one from T. L. Kimball, Esq., dated August 18, 1887, Kimball being the General Traffic Manager of the defendant company at that time —one letter having been received by witness and addressed to him, and the other being witness' reply thereto.

To the introduction of which the defendant, by its counsel, objected.

The letters were received, and defendants' counsel excepted.

The letter of Kimball set up and gave as the reason for the alleged discrimination, that the circumstances between the coal shipped from Fox mine and the Marshall, were entirely dissimilar, and also referred to the contract set forth in second defense, in which the Marshall company agreed to furnish coal for defendant's use, on its locomotives, at not to exceed $1.25 per

ton, and commercial coal for not to exceed $1.40, when, in fact, the prices, except for the contract, would have been $1.30 and $1.60 per ton. The letter of the witness, Taggart, was a denial of the dissimilar conditions and an argument against the position of Kimball (fols. 71–73). In this connection, also, the plaintiff's counsel (fol. 74) asked the witness if he had any knowledge of the existence of the special rate to the Marshall company prior to the disclosures before the Commission, to which defendant objected—that it was immaterial and incompetent—but the Court overruled the objection, and the defendant excepted, and witness answered he knew nothing until it was disclosed before the Commission. On cross-examination he showed that he began dealing with the defendant in 1882, and shipped to Denver several thousand tons of coal over its road, at $1.25 per ton, for a portion of the time, and for the rest of the time, $1, and that the rates were the same as everybody else paid; that there was nothing exceptional in either rate, except as to the Marshall company, and he knew of no other firm or company who had a rate less than $1, except the Marshall company; that he knew the defendant claimed as a bar to plaintiffs' claim, a contract with the Marshall company, in consideration of the latter company supplying the defendant company with coal, at a price much below the price at which they could get it out of the mine, and making a difference of from 20 to 25 cents per ton of coal, less than the cost of getting it out. Defendant's counsel then asked, "As a matter of fact, do you know what it did cost to get out a ton of coal and put it on the cars at

the Marshall or Fox mine?" To which plaintiffs, by their counsel, objected, and defendant's counsel claimed that the good faith of the defendant company, in making a contract with the Marshall company, was in question, and the question proper on that ground, but, the Court sustaining the objection, the question was not answered, and the defendant excepted. The witness also gave evidence tending to show that the rates of $1.25 and $1 per ton, from 1882 to 1887, was not to be complained of, and that the suit was brought because of the discrimination of 40 cents made between plaintiffs and the Marshall company.

Plaintiffs also introduced, as a witness, Robert H. Rubridge, Secretary and Treasurer of The Marshall Consolidated Coal Mining Company, who stated that the Marshall company shipped from Marshall 79,970 tons, and from Louisville 73,067 tons, between November 1, 1885, and May 1, 1887, and from May 1st to August 1, 1887, about 3,000 tons per month, and that from Marshall mine there was to Denver 67,863 tons from November 1, 1885, to August 1, 1887; that the freight to Denver was $1 per ton, but that 40 cents per ton was paid back; that the amount paid back up to August, 1887, was $27,145.33, and the contract was then canceled. Witness also stated that he knew of no inquiries about the contract between the Marshall company and the defendant company, except that Goodridge said he knew he was working against an embargo of 50 cents a ton, and asked witness if it was not so, and he told him it was not. Witness was then asked, "Did you know of the existence of this

contract prior to the meeting of the Pacific Commission?" To which defendant, by its counsel, objected that it was incompetent and immaterial; but the Court overruled the objection, to which defendant excepted. To which the witness answered, "No, sir; I did not; I was not asked about it by anyone, or thought about it." The witness further testified that the repayment of 40 cents per ton was made in consideration of the coal company having given a bond of indemnity to the Union Pacific company against all claims for damages against it, amounting to about $65,000, for which there was an attachment on some of the rolling-stock, ties and half a mile of track of the Denver, Western & Pacific; and, for a further consideration, "We were to give them coal at cost for the company's use, and not to exceed at any time $1.25 per ton, and also coal for commercial use, at not exceeding $1.40 per ton," and that under that contract the Marshall company furnished to the Union Pacific company, between November 1, 1885, and March, 1887, 52,078 tons, and about an equal amount for commercial use in Kansas. The witness also gave evidence tending to show that defendant company did pay for this coal, for the first few months, $1.75 but later, only $1.25 per ton, and part of the time $1.60, and the witness was asked to explain how it came that $1.75 and $1.60 were paid instead of $1.25 per ton, which was objected to by plaintiffs and the objection sustained, and the defendant excepted. The witness was then asked: "How much did it cost to get out coal and put it on the cars for the use of the Union Pacific, in its engines, and also for its commercial use in Kansas."

(Fol. 81.) To which plaintiffs objected, and the objection being sustained by the Court, the defendant excepted. The defendant company then offered to show by the witness that the cost of getting out this coal, which they were obliged to furnish the Union Pacific under the contract, was largely in excess of what they got, and that, in that way, they paid to the defendant and through the contract, by furnishing the coal, a larger amount of money than they got back in rebates, so that they actually paid to defendant company at least $1 per ton for every ton carried by defendant. But the Court refused to hear the testimony, and the defendant excepted.

Witness further testified that he knew of no demand on part of defendant that the contract should be kept silent, and that from 1882 to 1885 coal rates from Marshall to Denver were $1.25 per ton, and from 1885 to 1887, $1 per ton, and he knew of only one rate. The witness further stated that the claim of the Denver, Western & Pacific road was for damages caused to the Marshall company's coal mine by the D., W. & P. cutting into the mine, and causing it to to take fire, with loss of tools, etc., and that that part of the mine had never been worked since. That this company succeeded to that company (the original Marshall company), and gave the bond of indemnity against that claim, which had been in litigation some years, and that suit was released when bond was given. The indemnity bond was then introduced (fol. 82), and defendant counsel also offered in evidence the release of suit in attachment, which was excluded, and defendant excepted. On redirect, the plaint-

iffs showed by the witness that at the time of making of the agreement between the defendant company and the Marshall Consolidated Company, the Marshall Coal Mining Company had an attachment on the engines and rolling stock of the D., W. & P. Ry. Co., which attachment was held by the Marshall Consolidated Company, from the former company, the Marshall Coal Mining Company, and that all the litigation was against the Denver, Western & Pacific Railway, and not against The Union Pacific Railway Company, and on re-cross-examination, witness said he knew the claim spoken of existed, and that his company had to give the indemnity bond before they could get the contract.

The plaintiffs also showed, by witness, D. S. Wood (fol. 84), that he was mining coal at Canfield, and shipping to Denver; that Canfield was on the Denver, Utah & Pacific Railroad, and also on the defendant's line; that by the Denver, Utah and Pacific Railroad line it was twenty-four miles to Denver, and by the defendant's line thirty-six miles, but that he shipped over defendant's line. That Kimball, the General Traffic Agent of defendant, had told him prior to August, 1887, that the Marshall Consolidated Company was not getting any less rate than others, and witness was also told the same thing by defendant's General Agent, at Denver, Keeler. That the first that witness knew of the contract was at the time the Pacific Railway Commissioners were sitting at Denver, and that a short time after the Commission was here he had a talk with T. J. Potter, then General Manager of The Union Pacific Railway Company, and that Potter then said he knew

of the contract after he had been in office five or six weeks, and said he came to Colorado to cancel it, and said it was an unjust thing. To that part of this answer that states what Potter said about its being an unjust thing defendant, by its counsel, objected and asked that it be stricken out. But the Court refused to strike it out, and defendant excepted to the ruling. On cross-examination, witness showed that he had never shipped over the Denver, Utah & Pacific road, but had shipped since 1879 over defendant's road; that since 1879 there had been but three rates, one at $1.25 per ton; that then, upon the opening of the Denver, Utah & Pacific, it dropped, for a short time only, to 25 cents, and was then fixed at $1, and was the same on both roads; that the rate from the Jackson, Canfield and Marshall mines was the same, though there is eight or ten miles difference in the distance to Denver, and that no other company or person, to witness' knowledge, got any rebate except the Marshall Consolidated company, and that there were in the vicinity eight mines, besides the Marshall mine. Plaintiffs also introduced other testimony by witness (fol. 85) tending to show that in 1886 he had a talk with D. B. Keeler, defendant's general agent, as to rates, and Keeler, and afterward Clark and Kimball, all agents of the defendant, told him that all were getting the same rate. The witness was then asked by plaintiff's counsel if he also had a conversation with Rubridge, the Secretary of the Marshall Consolidated company, as to rates, and on his saying he had, and that it was about July, he was asked to state what Rubridge said. To this defendant objected that the evidence

was incompetent and defendant could not be bound by what Rubridge said, but the Court overruled the objection, and defendant excepted. The witness said he told Rubridge he was satisfied they were getting lower rates, for they could not sell coal at the price they did unless they got it, and he (Rubridge) said "we were all paying the same." On cross-examination, witness stated that he had been in the coal business twelve years, and that the Denver, Utah & Pacific had been operated adjacent to his mine since 1884, but that he never shipped over it, and that rates were the same on both roads.

BRIEF.

On this record we have assigned for error as follows:

First—The Court erred in sustaining the demurrer to the second answer of the defendant, which sets up the facts on which the agreement, also set forth therein, was made (fols. 28 to 49 and 59).

Second—The Court erred in admitting in evidence the letters of E. R. Taggart and T. L. Kimball (fols. 70 to 73).

Third—The Court erred in refusing to allow witness Taggart to answer as to what it cost to get out a ton of coal and put it on the cars at Marshall mine (fol. 76).

Fourth—The Court erred in not allowing the witness Rubridge to answer the question, "How much did it cost to get out coal and put it on the cars for the use of the Union Pacific company on

its engines, and also for its commercial use in Kansas." (Fol. 81.)

Fifth—The Court erred in not allowing defendant to show by witness Rubridge that, by reason of cost of getting out coal, etc., the Marshall Consolidated company actually paid at least $1 per ton for coal carried by the defendant company (fol. 81).

Sixth—The Court erred in refusing to receive in evidence the release from The Marshall Coal Mining Company to the defendant company (fols. 82 and 83).

Seventh—The Court erred in refusing to grant a new trial and in entering judgment on the verdict, because there was no sufficient evidence to support the verdict and especially to sustain it as to the amount of damages found by it.

By the statement of facts above made, which we think is a full and fair one, of what the record contains, it is clear that on the trial the Court below either did not adhere to its rulings on demurrer to second answer of defendant, or it admitted, on both sides, much irrelevant testimony; for if, as was held on demurrer, the facts set forth in second defense, made no defense, then did the Court err when it admitted plaintiff to introduce the letter of Kimball, in which the defense was made, and the letter of Taggart, in which an argument against the said defense was made (see fols. 70 to 73).

We will notice these assignments in their order. First, then, did the Court err in sustaining the demurrer to second defense? On this we say:

First—The action was brought under Sections 7, 8 and 9, on page 309, of Laws of Colorado, 1885. These sections read as follows:

"SEC. 7. (Unjust discrimination.) No railroad corporation shall, without the written approval of said Commissioner, charge, demand or receive from any person company or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company or corporation, for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, draw-backs and contracts for special rates shall be open to and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this State, when the approval of said Commissioner shall be obtained in writing."

"SEC. 8. (Extortion.) No railroad corporation shall charge, demand or receive from any person, company or corporation, an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation and not specified in the classification and schedule prepared and published by such railroad corporation. The Superintendent or other chief executive officer of each railroad in this State shall cause to be kept posted up in a con-

spicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion, and be subject to the penalties hereinafter prescribed."

"SEC. 9. (Penalty.) Any railroad corporation that shall violate any of the provisions of this act as to loading-points, freight cars, unjust discrimination or extortion, shall forfeit, in every such case, to the person, company or corporation aggrieved thereby three times the actual damage sustained or overcharges paid by the party aggrieved, which triple damages shall be adjudged to be paid, together with the costs of suit and a reasonable attorney's fee, to be fixed by the Court, and taxed with the costs." * * *

Under this law, plaintiffs were bound to show, both by allegation and proof that defendant had been guilty either of extortion or unjust discrimination, of which plaintiffs were the victims.

The statute itself, section eight, has defined what the extortion shall be shown, viz.: "Demanding or receiving an unreasonable price for transportation of persons or property." There is in the complaint no allegation in terms, that the discrimination mentioned was an unjust one, or extortionate, except in the words (fol. 21), "that such charges," ($1 per ton) to plaintiffs for transportation services, "were and are unreasonable, un-

just and extortionate," though no facts of any kind were alleged, or any proof thereof offered on the trial, that (aside from the fact alleged that the Marshall Consolidated company had coal carried at 60 cents per ton) the charge of $1 was too high. In fact, the plaintiffs and their witnesses all said they had no complaint to make of the $1 rate, *per se*. It is clear, then, from the complaint, and rendered doubly so by the evidence on the trial, that whether there had been an unjust discrimination against plaintiffs, and whether the charges he had paid were unreasonable or not, depended wholly upon whether defendent could justify its action towards the Marshall Consolidated company, in giving it a rebate, under the circumstances surrounding the two companies at the time the contract set forth, as defendant's second defense was made. Or, in other words, since the statute itself recognizes the fact that there may be a just, as well as an unjust, discrimination, and that must depend on circumstances which may show dissimilar conditions, the defendant may plead the facts, circumstances, and conditions upon which its action was based as they existed at and before the discrimination was made.

The defense was a lengthy one, but we submit it shows circumstances that justify the discrimination made. It shows that the defendent company, having been indirectly, through The Union Coal Company, engaged in mining coal, became anxious to get out of that business; at the same time it was anxious to obtain coal for its own use on its engines, and also anxious to obtain a release of a certain attachment levied in favor of the former

owners of the Marshall mine, on property acquired by the Union Pacific and necessary to its operations—the property coming to it subject to the attachment. On these grounds it entered into the contract set forth, and by it the company quit coal mining, got released from the attachment for $65,000, got a contract out of the Marshall Consolidated company to deliver it coal for its own use at *cost* of putting it on the cars—not to exceed $1.25 per ton; got commercial coal for use in Kansas at cost not to exceed $1.40 per ton; got a contract for five years' time, and got an option on the capital stock of the coal company for two years, and got a contract for 50,000 tons of coal to be furnished for its own use for first year, and 100,000 for each year thereafter.

On the face of it, this contract was a fair, reasonable and probably highly profitable one for the railroad company, and was worth to the railroad company much more than the rebate paid or to be paid under it, and this was the distinct and undenied allegation of the second defense. Indeed, the demurrer not only admitting that allegation, but all the facts set forth and leading up to it, it must be admitted that, upon the record herein, the facts show that instead of the Marshall company paying less than $1 per ton, they really paid more, and there was, therefore, no unjust discrimination and so no unreasonable charge in the regular $1 rate.

It is not to be denied that this action is brought under the Colorado statutes, but had it been brought under the common law, or if the facts as to character of the freight had warranted it,

under the Inter-State Commerce Act, the facts necessary to constitute a cause of action would have been, in many respects, similar, and the question would still have been, as it now is, did the facts and circumstances, including the agreement, constitute a defense to the charge of unreasonable charges to plaintiffs, or "unjust discrimination" against them? This is a question upon which few authorities are to be found. But in general, as to the right of a railroad corporation to make contracts to the same extent as individuals, we have the expression of this Court in the case of Chicago, Etc., R. R. vs. Iowa, 94 U.S., 161, wherein Chief Justice Waite says: "This company, in the transaction of its business, has the same right and is subject to the same control as a private individual under the same circumstances," and this, we think, is in accord with both reason and authority, since the adoption of any other rule would lead to endless complications. No authorities need be cited to show that the power to do business carries with it the rights incident to a transaction of that business in the ordinary way, and to do and perform all acts and make all agreements ordinarily incident to it and to succeeding in it, and all contracts thus made and not violating any law or any rule of public policy must be sustained and are good, either as a defense or as a ground of action.

This, we contend, is the character of the agreement set up as a defense in this case to the charge of unjust discrimination. The Court below sums up its objection and the ground of its decision thus: "The whole answer amounts only to this, that the Marshall company is allowed less rates than other shippers are required to pay upon considerations

that are satisfactory to defendant, and it is obvious that this is no answer to a complaint of unlawful discrimination." (Fol. 55.)

But we respectfully submit, that that statement is only a partial statement as to what the answer amounts to, and that in addition to what the Court states, the answer, in express words, averred that the agreement mentioned therein was made for the reasons stated in the answer and for no other; and that under that contract, the Marshall company had paid and the defendant had received of the coal company, as a matter of fact *more* than the $1-rate, though it was not intended it should when the contract was made, and that at the time the contract was made it was *believed* that by reason of the contract the Marshall company would pay for the five years the full schedule price of $1 per ton.

It is clear also that this answer sets up the good faith of the company in making this contract, and that it was made because of the facts stated therein, and with no intent to evade or violate the law, or to discriminate against anybody, and hence, it is *not* "obvious" to us, at least, and we think it is obvious to no one, that "*this* is no answer to a complaint of unlawful discrimination." The right to settle and compromise matters in litigation or in dispute between a railroad company and others, is as important and as much under the protection of the law as between individuals, and when a settlement of such claim is made in good faith we know of no law that will allow a Court to declare such a settlement *null*, unless in some way it violates some rule of law. If it be lawful to set-

tle a claim by compromising it, then it is surely error to deprive either party of the right to use such compromise as the consideration of other lawful contracts, the end and purpose of such contract being also lawful, and that is the error committed in this case. The Court below further says: "This law cannot be controlled or defeated by *any* agreement between the railroad and the favored shipper. It is true that when the consideration paid for reduced rates by the favored shipper is obviously equal to the discount allowed him the law does not apply."

To which we say, as to the first proposition, that we do not seek to control or avoid the law by this agreement. We seek simply to show that, by reason of the agreement, the case does not come within the law. To say that *no* agreement made between a railroad company and a shipper could prevent a discrimination as to rates resulting from such agreement from being held unjust, is to say that no agreement on that subject can be made, which is certainly not true. The second proposition, that the law does not apply, when the consideration paid for reduced rates is equal to the discount allowed, is correct, and it certainly follows, that, if the railroad company sets up, by way of defense to the charge of unjust discrimination, that the *price* paid for the reduced rates was *equal* to, and that when made it was thought it would be *equal* to, the discount for the five years, obviously the answer was a good one, since under it proof of the exact state of facts upon which it might appear that the consideration for reduced rates mentioned in the answer was equal to the discount. In other

words, the Court says that a defense that sets up a consideration for reduced rates paid, that is equal to the discount allowed, is a good defense; but, in the next breath, says a defense that, by the facts, alleged, and in express terms sets up, that the consideration *was* equal to the discount, is bad.

Again, the Court says: "Whenever the fact appears, since it matters not in what form the shipper pays the usual rates, the alleged discrimination disappears and the contract is no longer obnoxious to the law." To this, too, we cheerfully assent, and we say, "Since it *matters not in what form the shipper pays*," it is as much a payment to settle matter in litigation and as much a payment to bind oneself to furnish 50,000 tons of coal for one year and 100,000 tons for four years, at a price below cost, as to pay cash on each ton carried, always provided the settlement and contract to furnish coal at those prices was made in good faith. The conclusion thus drawn by us is, we think, incontrovertible, and, hence, on the Court's own statement, the judgment of the Court in sustaining the demurrer was an error, and it was error beyond dispute, unless the reasons given by the Court why this principle could not thus apply to the case are sound. The Court (fol. 56) further says: "If, to illustrate, the damages due the Denver and Western company have been liquidated and the agreement was to carry a certain quantity of coal for the amount so fixed, the question would be different." How different, let us ask? How does it affect the question of whether the discrimination was just or unjust, that the amount was or was not liquidated, provided, only, that the contract was

made in good faith and both parties were willing to take the claim as it stood, as the consideration for the discount? To hold that the mere fact that the amount is unliquidated is to deprive both parties of their undoubted right to use the compromise for a legitimate and useful purpose, a right which they certainly had. Besides, in this case, the demurrer admits the facts set up in the answer, and the Court is not at liberty to indulge in any inferences against those facts; it was, therefore, bound to hold this claim of $65,000 as a valid, subsisting claim, and whether liquidated or not, cuts no figure whatever if parties saw fit to offset any amount against rates. But more than this, the contract was to carry a certain quantity of coal, not for the claim of $65,000, which was released, and of which the railroad company got the benefit alone, but in consideration, also, that the coal company would mine and furnish to the railroad company, and on its cars, a fixed amount of coal per year for five years, at a fixed price per ton.

We know of no rule of law that makes a contract bad, simply because made on more considerations than one. The Court further says: "As it stands, the agreement is to give the Marshall company a reduced rate, for certain considerations, which defendant says are sufficient to make up the discount from the schedule rate; and, as to that matter, the fact cannot be ascertained from the contract or otherwise." *So understood*, it is clear that the contract affords no protection to defendant or to the discrimination in rates to which plaintiffs and other shippers of coal over defendant's road are subject."

Here the whole ruling is put upon an alleged impossibility of ascertaining, "from the contract or otherwise," whether the considerations mentioned in the contract are sufficient to *make* up to the defendant company the discount allowed to the coal company. This ruling, on this ground, is certainly erroneous. Neither the Court nor any shippers have or had any right to question the action of the defendant company in making such a contract, if the contract represents the best judgment of the defendant, and made *bona fide*, without intent to evade the law, upon any such ground as that stated. If, in the honest judgment of the officers of the defendant company, who made the contract, the considerations which entered into it, and upon which alone it was made, were sufficient to warrant the company to pay *back* to the Marshall company 40 cents per ton for each ton it shipped for five years, that is enough. Nothing more should be or legally could be required to make it a good contract, and good for all purposes. True, it would be impossible to tell, in advance, whether the defendant company had acted wisely or otherwise, since it may be that if they had litigated the $65,000 claim, it might have been cut down to $10,000, or even less,and it may also be that, within the five years, coal for defendant company's use, in quantities of 100,000 tons per year might have been obtained of this company, or some other, at even less than $1.25 per ton; but it is equally true that it might also have turned out, that, in the absence of such a contract as this with this company, the necessary amount of coal would have cost much more.

Coal in this country is indispensable to the

operation of a railroad. Coal in large quantities and certain to be delivered to it when needed, is as necessary to continued and successful railroading as blood is to animal life; and hence ordinary prudence required a provision for coal to be made in advance. Theretofore, the company, as is shown by the answer, had *worked* mines owned and operated in connection with the road, the coal company being an adjunct to the railroad company. When this arrangement ceased, some other *sure* arrangement was necessarily made for supplying the wants of the defendant company.

Now, what principle of law or public policy can be invoked to render a contract of that character, honestly entered into for an honest end, a void contract? How can the fact, if it be a fact, that neither from the contract, or from outside the contract, the Court below or this Court cannot tell which of the two companies contracting got the best of the bargain, make the contract void, or render it of such a character as that it may not justify the reduction of the rate? The sole and only question is, did the company defendant honestly enter into the contract and honestly consent to this discount, honestly believing it had a *quid pro quo*, that was sufficient to justify it in giving the discount? If it did, then there was no unjust discrimination, and whether the company made money or lost money by the contract is not important, and so it is not important to be able to find from "the contract itself, or outside of it," whether the consideration was in fact equal to the discount.

An unjust discrimination in rates is doubtless contrary to sound public policy, but the difficulty

is to find out what is an unjust discrimination. It has been justly said, "that it is only when the discrimination enures to the undue advantage of one man in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in."

Hays vs. Penn. R. R., 12 Fed. Rep., 311.

The Court below tried to bring this case within the decision just quoted, by saying: "The Marshall company are dealers in coal in the same market, depending largely on the same rates of transportation for the profits of their business. The direct effect of a reduced rate to the Marshall company was to reduce the profit on plaintiff's coal to the extent of such reduction." To this, we say, this conclusion can be arrived at only by assuming as true, what the second answer specially and with careful statements of fact undertook not only to deny, but to show affirmatively was untrue. Nobody will pretend that the necessary direct or indirect effect of a reduction of rates is to reduce the selling price of coal, for the party receiving the reduction might content himself with selling at the same price as though no reduction had been made, and certainly no Court has the right to hold that such was its effect when the party complaining nowhere alleges any such thing, and defendant had denied that plaintiffs had suffered any damage. There is not one word in the complaint that even remotely suggests that plaintiffs' damages arose from the fact that the price of coal or the profit on coal sold by them was in the slightest degree affected by the

fact that one is alleged to have paid $1 and the other 60 cents per ton. Nor is there a suggestion or hint that the amount of coal mined and sold by plaintiffs would have been one pound greater if this difference of rates had not existed, so that it is clear that the Court below, in order to hold the second answer, no defense, was obliged to and did assume the truth of everything the answer denied, and assumed also that plaintiffs had alleged loss of profits caused by the difference in rates, when the fact was they had made no allegations of that kind, and when, in fact, the alleged damages were specially alleged to have arisen, *not from loss of profits in selling coal in reduced quantities or at reduced prices*, but as they say, "For overcharges, concessions and rebates under such conditions and circumstances that the defendant was liable to the parties damaged in triple damages under the laws of Colorado." And this is made still plainer by the fact that the prayer for damages is exactly three times the amount of the reduction computed at 40 cents per ton on the amount of coal they had shipped.

The statute referred to provides for a forfeit to the person aggrieved by unjust discrimination "*three times the actual damages sustained* or *overcharges* paid." Now, as there is no allegation whatever of "actual damages sustained" to be found in the complaint, the only thing left was to ask for three times the overcharge. But there can be no overcharge unless there is either a charge greater than what is fixed in the general schedule of rates, or there is, with or without a schedule, an *unreasonable* charge. As to the first point, it will be seen that

there is not a particle of proof, from any source, that any person or corporation, other than the Marshall company, had any rebate whatever, and the proof is that there were eight or ten other persons or corporations shipping coal from the same locality and at the same rate—$1—and hence there was no overcharge to plaintiffs in the sense of their being charged more than the schedule rate, and as to an overcharge on the ground that it was unreasonably high, not only is there nothing of the kind alleged by plaintiffs, but it was fully met by plaintiffs and their witnesses, all of whom said there was no complaint to be made on that score. To conclude on this point, we say, since the plaintiffs alleged no damage actually sustained, and since there is neither allegation nor proof that what they did pay was, under the statute, an overcharge, and since the record shows a fixed schedule of reasonable rates that everybody paid except one, it would seem that the complaint stated no cause of action for more than nominal damages, if, indeed, for any damages. Whether that be so or not, we are confident that, unless a railroad corporation is to be denied the right to conduct its affairs in settlement of claims and in providing for its wants, the same as persons or other corporations may do, the second answer set up a good defense.

Nor is there apparent to us any reason why a railroad company may not settle claims against it, or against its property, and provide for its future wants by bargaining with those who hold such claims, and who are prepared to supply its wants; and that being so, we see nothing to prevent contracts of this character being set up to protect the

company against charges of the kind set forth in this complaint.

Second—The second error assigned is in admitting the letter written by T. L. Kimball and the reply of E. R. Taggart thereto. We think there was error in this, because it is obvious, from Kimball's letter, that it was an answer to charges which are not set forth in Kimball's letter, and were not shown in evidence by plaintiffs; and hence, the defendant not being apprised of an intention to introduce the letter, could not be required or expected to produce it, and the plaintiffs must be presumed to have been able to procure the same.

2d. The letter of Kimball was wholly irrelevant and immaterial, since the defendant had admitted that the contract referred to in that letter had been made, and the terms thereof had been set forth precisely as Kimball set them forth.

3d. It will be noticed also that only a part of the consideration for making the contract set up in the answer, is attempted to be given in Kimball's letter, and the inevitable tendency would be to prejudice the jury against the defendant, if this partial statement did not seem to warrant defendant's action.

4th. The introduction of Taggart's letter in reply can be justified, as we think, on no possible view to be taken of it. Taggart was not a party to the suit, but a witness. What Taggart said or wrote, either as to the facts, or as to his conclusions from facts, was mere hearsay, and ought not to have been received, but, worse still, it was not only hearsay as to facts, but it was a stump speech by way of argument, on the exact question

before the Court, at the trial, viz., whether the conditions of shipment between the Marshall company and the plaintiffs were identical or similar, and whether defendant company had violated the law.

On the the first point he asserts the facts of exact identity of conditions on his own judgment. On the second, he avers that "highest legal sources of information had assured him that the contract in question was clearly in violation of law." It is perfectly clear that the jury may have been deeply impressed with this averment of fact, and this conclusion of law, drawn from the "highest sources," whatever those sources may be. Lastly, it is plainly to be seen that both his first letter, Kimball's letter and Taggart's reply, were all written by way of negotiating a settlement of the claim of Taggart against the defendant, and if so, then all these letters as well as all verbal utterances on that subject, were inadmissible against objections to their admission. To this we need cite no authorities. It cannot be denied that this letter of Taggart's was calculated to injure the defendant by influencing the jury against the defendant.

Third—The third, fourth and fifth assignments of error may be discussed together. The errors assigned are in refusing to allow the defendant to show by plaintiff's witnesses, Taggart and Rubridge, the cost of taking out coal and putting it on the cars, both of them being engaged in mining and taking out coal, and necessarily familiar with the cost; such attempt being made on cross-examination of the witnesses. By refering to the record (fols. 76 and 81) it will be seen that Taggart (fol. 75) had already, with-

out objection, testified and given in evidence Kimball's letter relating to the claim of defendant, that there was no unjust discrimination because of the fact that by the contract the Marshall company was bound to furnish to the defendant company coal at a price at which the Marshall company could not possibly make a cent of profit and on which, as it was claimed, it would lose more money than it would get under the rebate of 40 cents provided for in the contract. And the same was also true of the witness Rubridge. Under that state of facts it was clearly the right of defendant to inquire about, and to show, if it were able, what it did cost to mine and deliver on board defendant's cars, the coal delivered under the contract. There could have been no question as to the right to this evidence had the second defense been allowed to stand, because it would have been exactly in the line of the allegations contained therein; and it is equally true when the said defense has been stricken out, for the obvious reason that an unjust discrimination or an unreasonable charge imposed, is actionable at common law. And hence the defendant having fully answered by denying generally and specially that it had been guilty of either offense, anything that tended to show that the discrimination was not *unjust* or that the charges were not *unreasonable* was admissible, and we know of no rule of law that can be invoked to prevent the defendant from showing facts that would tend to show the character of the discrimination, and whether there had been in reality an unreasonable charge, by cross-examination of plaintiffs' witnesses. That it was not legitimate cross-

examination no one has ever yet even suggested, and if it had been it could not have been sustained. In the Court's decision on the demurrer to the second defense, we have seen that it was held bad because it was said that, under the contract, it "could not be ascertained from the contract or otherwise" whether the consideration in the contract for reduced rates was sufficient to make up the discount. But, we submit, that having denied the unjust discrimination, we were entitled to try to prove that it was not unjust. The decision itself inferentially says, if, from the contract or otherwise, you could prove the consideration mentioned in the contract sufficient to make up the discount, then the contract would be a defense. The offer was made to show that they were sufficient, and if it had been shown, to the satisfaction of the Court or jury, it would have been as effective to defeat the action as if the second defense had stood, because the effect of our general and specific denial was to deny that plaintiff ever had a cause of action, and anything that tended to prove that the discrimination was not unjust was admissible. The Court having thus erred in admitting improper evidence, referred to in assignment 2, and having also erred in rejecting competent and proper evidence, referred to in 3, 4 and 5, we submit the judgment should be reversed because the rule is, that the rejection of competent evidence that would bear in the *slighest degree upon the issue* or the reception of incompetent or improper evidence of a like character is ground for reversal.

In Church vs. Hubbart, 2 Cranch, 187–239, this Court said: "If the Court erred in admitting as

testimony papers which ought not to have been received, the judgment is, of course, to be reversed and a new trial awarded." So in Smith vs. Carrington, 4 Cranch., 69 and 70, this Court said of improper evidence admitted: "Into its importance or operation this Court cannot inquire. It was improper testimony, and a *verdict founded on improper testimony cannot stand.*" In Watt vs. Starke, 101 U. S., 247–251, the Court quotes with approval the rule we are contending for, as announced by the English Court of Chancery in Barker vs. Ray, 2 Russ, 75: "It has been ruled over and over again that if, on the trial of an issue, a Judge reject evidence which ought to have been received or receive evidence which ought to have been rejected, though in that case a Court at law would grant a new trial, yet if this Court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely on such grounds."

To the same effect is—

Clark vs. Vorce, 19 Wend., 232.
Myers vs. Malcom, 6 Hill, 292.
Worrall vs. Parmerlee, 1 N. Y., 519.
Hartford F. Ins. Co. vs. Smith, 3 Colo., 422.
F. & M. Bank vs. Whinfield, 24 Wend., 419.
Stetson vs. City Bank, 2 Ohio St., 180.
Spanagel vs. Dellinger, 38 Cal., 278.
Baird vs. Gellett, 47 N. Y., 187.

Fourth—The sixth error assigned is in the Court's refusing to allow in evidence the release given by former owners of the Marshall coal mine

from damages, etc. (fol. 82). Here again it will be seen that the witness had testified, without objection by anybody, to the fact of there being a bond of indemnity against the suit for damages and a release of the defendant company from all damages that could be had in the suit by the mine owners, such damages being secured by attachment on the property held by defendant company, and had shown that a release had been made and delivered to the defendant company. Such release was then offered in evidence and rejected. This release from liability to damage was one of the alleged considerations upon which, and in return for which, defendant had allowed the rebate, and, if such release was a part of the transaction which tended to show that the conditions and circumstances between the Consolidated mining company and other coal companies were dissimilar, such evidence was certainly admissible, and, as already said, evidence of this character was good with or without the second defense. Clearly, then, this was competent and important evidence to go to the jury, and should have been received.

Fifth—The seventh and last error assigned is, in refusing to grant a new trial and in entering judgment, because there was no sufficient evidence to support the verdict, and especially to sustain the amount of damages found by it.

To sustain this verdict, it must appear that there was, first, evidence sufficient to warrant a finding that defendant, either under the statute or at common law, had been guilty of unjust discrimination or overcharges against plaintiffs, to their damage; and, secondly, the amount of damage actually sustained.

On the first point, we call attention to the fact already adverted to, that the charge of $1 per ton was shown to be a *fair* tariff by the plaintiffs' own witnesses. So in that, there was no overcharge. Secondly, there was no unjust discrimination shown, damaging to the plaintiff, in any view of the evidence that can be taken, for it was neither alleged, proven, or even claimed that plaintiffs had ever sold a pound of coal less, or at a less price, than they would have sold had no rebate been allowed; nor was there any evidence whatever, of any kind whatever, that ever tended to show *actual* damage of any kind to the plaintiffs. Even had there been no excuse shown for this difference of rate, it would still have been true that a less rate paid by one shipper is no damage to another paying a higher rate, and does not necessarily make the higher rate either an overcharge or an actual damage; and if it did thus damage plaintiffs, it should have been shown.

We admit that some Courts of this county have held that the statutes prohibiting discrimination are but declaratory of the common law, and, that being so, a complaint which states a cause of action under either the statute or the common law, would be good; and so if the proofs were sufficient to make out a case under either, that would be all that was required. It must also be true that a defense of any character that would show, or tend to show, that the discrimination was not unjust, and that plaintiffs suffered no pecuniary damage, must be good; and so, on denial of facts set out in the complaint, all evidence tending to show the reason for the discrimination, and whether it did

or did not damage plaintiffs, was admissible, the burden being on plaintiffs to show damage.

Both common sense and common law unite in affirming the soundness of the views already quoted from the case of Hays vs. Pennsylvania Co. and in the decision of the Court in the case of Scofield vs. Railway Co., 43 Ohio St., 571–619, it is said:

"The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of anyone, unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others, or, as said by Crompton, J., to the plaintiff upon the trial of such a suit, the charging another party too little is not charging you too much."

Gaston vs. B. & E. R. R. Co., 1 B. & S., 112, 154, 165.

"Discrimination, if reasonable and founded on grounds consistent with public interest, is allowable."

Hersh vs. North. R. R., 74 Pa. St., 181.

Chicago, Etc., R. R. vs. People, 67 Ill., 11.

In Fitchburg R. R. Co. vs. Gage, 12 Gray, 393–399, the Court, after discussing the question at common law, says:

"The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual, consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, *no wrong can be done* and no cause afforded for complaint. If, for special reasons, in *isolated* cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals, for a certain time, or in certain quantities, for less

compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. * * * The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable; certainly, then, the charges of plaintiffs should be considered legal as well as just, nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because, for special reasons, which are not known, and cannot, therefore, be appreciated, allowances may have been conceded in particular instances or in reference to particular series of services to other parties."

If this be sound law, then *a fortiori* it must be true that, in the case at bar, plaintiffs, under circumstances disclosed by the testimony have no right to recover anything, much less at the full rate of rebate on coal carried for only one coal company, and when no lessening of the price of coal is claimed and no lessening of the amount of coal plaintiffs sold is claimed. So, too, in the case of McDuffee vs. R. R. Co., 52 N. H., 451, the Court says:

"A service at a price that would otherwise be reasonable may be made unreasonable by an unreasonable discrimination. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious; in such cases it would be actionable."

In Ransome vs. Eastern C. Ry., 1 C. B. N. S., 437, it was held that, in determining whether a company has given undue preference to a par-

ticular person, the Court may look to *the interests of the company*, and then adds:

"In other words, if the charge on the goods of the party complaining is reasonable, and such as the company would be required to adhere to as to all persons in *like condition*, it may nevertheless lower the charge to another person, if it be to the advantage of the company, not inconsistent with the public interest and based on a sufficient reason. It is obvious that the intention of the defendant, in this instance, was not to discriminate against the complainants in favor of any person of the same place and *in the same condition*. His object was to get business for his road from persons at a distance from its terminus, which would otherwise reach their destination by a different route. Under these circumstances we cannot see that the contracts complained of are against public policy or that the complainants have been damaged if the charges on their goods were reasonable."

This, we think, is sound law and especially applicable to the case at bar, since there is not even a pretense of evidence of damage "*actually sustained*," except the simple fact, that under the facts and circumstances shown in this case, a rebate of 40 cents per ton was allowed the Marshall company, which rebate in nowise affected either the price or amount of coal sold by the plaintiffs and affected them in no manner whatever, unless it was to hurt their feelings.

We have said that some of our Courts hold that laws against discrimination are but declaratory of the common law, but we submit, the question is still an open one, and certainly an open one in this Court. The subject was touched upon in the express company cases, 8 Fed. Rep., 802, and 10 Fed.

Rep., 210, and 117 U. S., 1, but was by no means decided.

In Messenger vs. Penn. R. R., 36 N. J. L., 407, the Court holds that way, but apparently on the sole authority of Smith, in his Leading Cases, p. 174, and the case of Sanford vs. R. R. Co., 24 Pa. St., 378. As to the former, it is Smith's opinion only, while as to the latter case, it was clearly decided on the provisions of the charter of the company which required it to transport articles, and "so that equal and impartial justice shall be done to all owners of property."

We think it can hardly be claimed that the point is really decided in any of the cases we have referred to, while it is an undisputed fact that the English authorities hold that the carrier may discriminate at common law without being held liable to repay the difference in amounts received, and this is the view taken of it in the case of Johnson vs. Railroad Co., 16 Fla., 623, and the recent case of Cowden vs. The Pacific C. S. S. Co., 94 Cal., 470, which appears to be a very well considered case, holding that at common law a complaint that does not show the charge to be unreasonable does not state a cause of action, even though it does state that the carrier charged one man more for the same service than he did another. Now, if this be true, there was no cause of action stated in the case at bar, and, as no unreasonable charge was proved, but quite the contrary, it would seem there was neither cause of action stated or proved, and even if it be held that an allegation of discrimination, either under the statute or common law, without alleging damage suffered thereby,

would be the statement of a cause of action, still there is error in this verdict, since no case can be found at common law that gives plaintiff the right to recover the amount of discrimination against him, and no case can be made under our statute except upon proof of overcharges and the amount or actual damages sustained, neither of which was shown in this case. On this record the verdict and judgment thereon can be sustained only by the assumption that plaintiffs suffered damages in the sum stated from an overcharge to that amount or sustained actual damages to that amount by an unjust discrimination against them. The fact cannot be assumed, because, as already said, plaintiffs and their witnesses admit that the charge of $1 is not an overcharge or in anywise unreasonable, and, as to the unjust discrimination, there was neither allegation nor proof that even tended to show that the amount of coal sold by them was lessened or the price at which it was sold was reduced, or that plaintiffs could have sold more or at a higher price, had no discount or rebate been made to the Marshall company, and as no damages to the plaintiffs would appear to be possible from the discount except on one or other of these grounds, we think it clear to a demonstration that plaintiffs failed to show any damages sustained by them for which any recovery could be had, and the judgment for damages never sustained, ought to be reversed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

THE UNION PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *vs.* HENRY GOODRIDGE and HIRAM MARFELL.	No. 211.
THE UNION PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* *vs.* E. R. TAGGART.	No. 212.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Supplemental Brief for Plaintiff in Error.

JOHN F. DILLON,
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For Plaintiff in Error in both cases.

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Supplemental Brief for Plaintiff in Error.

We refer to the main brief for the plaintiff in error for a statement of case and assignments of error. The purpose of this supplemental brief is to state briefly our main propositions of law, and to add citations of authorities.

Head-note to the Decision of the Circuit Court in These Cases.

If a railway company has a schedule rate of one dollar per ton on coal, and it receives its pay from one shipper partly in money and partly in other property, such money and property being together equal in value to the full rate of one dollar per ton, it thereby makes a discrimination against another shipper who pays wholly in money; and such other shipper can recover back from the railway company a sum of money equal to the difference between the one dollar paid by him and the amount of money paid by the other shipper. In other words, freight rates cannot be paid in property other than money, even though the property be of equal value, and be necessary and proper for use by the railway company in its corporate business.

We have stated the above as a head-note to the decision of the Circuit Court, for the reason that it states briefly and exactly what that Court decided in both of these cases, and what it held to be the law in its opinion on the demurrer in both cases, which opinion is reprinted in the record, in No. 212, p. 28. Such is not the law. There is no authority cited for any such rule, nor can be. In the main brief and in this supplement we cite the authorities against such a rule. It is obviously unjust, and cannot be upheld unless by virtue of an inexorable positive enactment, and there is none such.

I.

Upon the facts as alleged in the second answer of the defendant (Goodridge case, Record, pp. 13 to 27; Taggart case, Record, pp. 17 to 30) **and as offered to be proved in evidence by the defendant** (testimony of Rubidge, Goodridge case, Record, p. 45; Taggart case, Record, p. 42), **there was no discrimination whatever in favor of the Marshall Coal Company or against the plaintiffs. It was both alleged and offered to be proved that the Marshall Coal Company, as a matter of fact, paid at least one dollar per ton for the coal carried for it by the defendant. The Court, therefore, erred in sustaining the demurrer to the answers in the two cases** (Goodridge case, Record, p. 32; Taggart case, Record, p. 52), **and also erred in rejecting the evidence offered by the defendant to show that the Marshall Company actually paid at least one dollar per ton for the coal carried for it by the defendant** (Goodridge case, Record, p. 45; Taggart case, p. 42).

Our proposition under this point is, in brief, that the answers of the defendant in both cases show that, as a matter of fact, the railway company received from the Marshall Coal Company at least one dollar per ton for all the coal shipped by it during the period in question. It matters not whether the payment of this one dollar was made in money or was made partly in money and partly in property of equal money value. The railway company clearly may receive payment for freight in

other property as well as in money. Especially may it do so when it receives payment, as in this case, partly in coal, which is necessary and proper for use upon its railway. There was no discrimination. The test in this case, as in like cases, is whether the railway company received an *equivalent in value* to its schedule rates. Whenever this is the fact there is no discrimination. The answer of the defendant states clearly the facts which show that the railway company received in value from the Marshall Company an equivalent of at least one dollar per ton upon all the coal shipped. The Marshall Coal Company paid the defendant railway company the following considerations in addition to the sixty cents per ton:

First, it sold large quantities of coal to the railway company for not exceeding $1.25 per ton, which cost the coal company itself $1.60, or thereabouts, a sum largely in excess of $1.25 per ton. The difference between the price by the defendant railway company for this coal, and what this coal cost the Marshall Coal Company, or the market price of this coal, was so much paid by the Marshall Coal Company to the defendant company as part of the freight for its own coal.

Second, the Marshall Coal Company released a lien and attachment of the railway company's property for $65,000, based upon a claim of the Marshall Coal Company against the defendant railway "for damages, by reason of the location, construction and operation of the railway over, through and upon the Marshall Company's mines" (No. 212, p. 43; No. 211, p. 46), and for damages for setting fire to the Marshall Coal Company's mines, "which fire continued to burn many

months, destroying large amounts of coal, personal property, &c." (No. 211, pp. 16, 20, 24 (bond), 26, 46 (release), 46 (Rubidge's Evidence); No. 211, pp. 19, 23, 28 (bond), 29, 30 (release, copy, p. 43); 43 (Rubidge's Evidence)).

This suit and attachment of defendant's property for $65,000 was actually pending when the contract of October 13, 1885, was made, which contract and bond of indemnity and release settled this controversy, and was one of the considerations for the rebate to the Coal Company. This, too, was a valuable property consideration paid by the Marshall Coal Company to the railway company as part of its freight.

Third, the Marshall Coal Company granted to the defendant railway company an option on the capital stock of the coal company for two years. This, too, was part of the consideration paid by the Marshall Coal Company as freight to the defendant railway company.

The answer of the defendant in each of these cases sets up these facts, showing that the Marshall Coal Company, as a matter of fact, paid at least one dollar per ton for all the coal carried for it by the defendant railway company. After setting up these facts the answer distinctly alleges (Goodridge Case Record, p. 26; Taggart Case Record, p. 30):

"And this defendant further says that on account of the settlement of the claims made against it by the said Marshall Consolidated Mining Company, which said claims were settled and provided for in the said contract above set forth, and on account of the coal necessarily used by it the defendant, and furnished to it by

the said Marshall Consolidated Coal Mining Company under the terms of the contract above set forth, the said Marshall Consolidated Mining Company have paid to this defendant, and this defendant has received of the Marshall Consolidated Coal Mining Company, a higher rate, as a matter of fact, than $1 per ton, although it was not intended that the rate should exceed the schedule price ; that at the time of the making of said contract it was believed that the price at which the coal was to be furnished to this defendant for its use on locomotives, and on account of the settlement of the claims as aforesaid, and on account of the benefits accruing to this defendant by the reason of the Marshall Consolidated Mining Company taking and operating the said Louisville and Erie mines, this defendant would receive from the said Marshall Consolidated Coal Mining Company for the said period of five years, during which said contract was to operate, the same price as that fixed in the schedule price."

This allegation in the answer is a distinct allegation of the fact that the Marshall Coal Company paid the full schedule rates, and that there was no discrimination.

The Court, however, sustained the demurrer of the plaintiffs to this answer of the defendant in both cases (Taggart case, Record, p. 32 ; Goodridge case, p. 32). The Court below, HALLETT, J., in the opinion says (Goodridge case, p. 31) :

" It is true that when the consideration paid for the reduced rates by the favored shipper is obviously equal to the discount allowed him the law does not apply, and whenever that fact appears, since it matters not in what form the shipper pays the usual rates, the alleged discrimination disappears, and the contract is no longer obnoxious to the law."

This is precisely our proposition. But the Court went on further to say (p. 31) :

" If, to illustrate, the damages due from the Denver and Western Company had been liquidated, and the

agreement was to carry a certain quantity of coal for the amount so fixed, the question would have been different. As it stands, the agreement is to give the Marshall Company a reduced rate for certain considerations which defendant says are sufficient to make up the discount from the schedule rate, and as to that matter the fact cannot be ascertained from the contract or otherwise."

With all deference to the learned Judge, this is not the law. It does not matter whether the damages due from the Denver and Western Company for injuries which it caused to the Marshall Company's mines had been liquidated or not. Neither does it matter whether the discount which the Marshall Coal Company gave to the railway company on coal purchased by the railway company was liquidated or not. All these things are matters of fact which can be proved and which the Court erred in refusing to allow the company to prove on the trial. They were matters in respect of which evidence could have been given before the jury, and then it was a matter for the jury to determine whether, on the facts in evidence, there was, in fact, a discrimination.

In the present case the defendant pleaded in its answer the facts which show that there was no discrimination. It offered evidence of these facts to show that there was no discrimination, but the Court refused to admit such evidence. There is no principle of law that requires that a consideration for a contract, in order to be a valuable one, be liquidated in money. The railway company, like any other person or company, has a right to make a contract in which the consideration paid is the compromise of a *bona fide* claim, or the acquisition of property, the value of which is not liquidated in money. The only question in such a

case is as to the *bona fides* of the transaction. For these reasons, the Court clearly erred in sustaining the plaintiff's demurrer to the answers in the two cases.

This Question Arises on the Record.

The question whether the Court erred in sustaining this demurrer is properly before this Court. It is a question which might have been raised at common law after verdict by a motion in arrest of judgment; and it may now be raised here on writ of error. It is a question which arises on the record of the case (see *Teal vs. Walker*, 111 U. S., 242).

The same question is also raised by the rulings of the Court on the admission of evidence, and by the exception of the defendant to such rulings. In both cases, when Robert H. Rubidge, who was the treasurer and assistant secretary of the Marshall Coal Company during the period in question, was on the witness stand, the defendant's counsel offered to show by him:

> " that the cost of getting out this coal, which they were obliged to furnish the Union Pacific under the contract, was largely in excess of what they got, and that by reason of that they paid to the defendant, through the contract and by furnishing the coal, a larger amount of money than they got back in rebates, so that they actually paid to the defendant, at least, one dollar per ton for every ton carried by defendant; but the Court refused to allow such evidence to be given or received, and thereupon the counsel for defendant then and there excepted to such refusal."
>
> Goodridge Case, Record, p. 45; Taggart Case, p. 42.

Thus, the defendant offered testimony to show that there was, in fact, no discrimination, and that the Marshall Coal Company paid, in money and property,

the full schedule rates. The Court erred in refusing to admit such evidence.

We submit, with perfect confidence, that since the defendant company, according to the answer and the offered evidence, received from the Marshall Coal Company in money and property at least one dollar per ton, the full schedule rate which was charged to plaintiffs, there was, as a matter of fact and of law, no discrimination against the plaintiffs, and therefore no cause of action. This proposition is so clear that authorities are not needed to support it. Nevertheless, we proceed to show that it is clearly established by the authorities.

Authorities in Point in Addition to those Cited in Main Brief.

In *Root vs. Long Island R. R. Co.*, 114 N. Y., 300, 1889, the Court of Appeals of the State of New York decided a precisely similar case in accordance with our proposition above stated. The Long Island R. R. Co. had entered into a written contract with one Quintard which, among other things, provided that Quintard should build at Long Island City upon the lands of the Railroad Company a dock and erect thereon a pocket for holding and storing coal according to certain plans and specifications. The railroad company was to have the use of part of the dock. In consideration therefor the railroad company *agreed with Quintard to transport in its cars all the coal offered for transportation at a rebate of 15 cents per ton from regular tariff rates.* Pursuant to the agreement the dock and coal pocket were constructed and coal in large quantities was shipped over

the railroad by Quintard or his assignees. *The action was brought for the rebate of 15 cents per ton.* The railroad company set up as a defence that the contract was illegal and void on the ground that it was a discrimination in favor of Quintard. But the Court of Appeals unanimously decided that the question whether there was a discrimination was a matter of fact, and not a matter of law; that on its face the contract was not, as a matter of law, invalid; and that inasmuch as the referee had not made any finding of fact that there was a discrimination, the Court affirmed the judgment of the Court below, which was in favor of the plaintiff, and gave him the rebate which he demanded. The Court in its opinion said:

"This raises a question of fact, which must ordinarily be determined by the trial Court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the Referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and, consequently, there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this Court.

"*Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates, an unjust discrimination as a matter of law?* Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket, which was to be constructed upon the defendants' premises at an expense of $17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was un-

derstood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial Court, as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others."

This case is exactly in point here. It was, in the present case, a question of fact whether there was a discrimination in favor of the Marshall Coal Company and against the plaintiffs. The defendant pleaded, in its answer, and offered evidence to show, that there was, as a matter of fact, no discrimination. The Court below, therefore, erred in sustaining the plaintiffs' demurrer to the answer and in rejecting such evidence.

So also in the cases which have arisen before the Interstate Commerce Commission it has been several times decided that, in determining whether there is discrimination under the provisions of the Interstate Commerce Act, other facts than the mere rate paid by the shipper as compared with the schedule rate shall be taken into consideration. For example, in the case of Scofield against the Lake Shore and Michigan Central R. R. Co. (2 Interstate Commerce Reports, Lawyers' Co-operative Edition, p. 67, 1888), it was decided by the Commission that the railroad company ought to make a lower rate to the shippers of oil who use their own tank cars than they made to other shippers who did not furnish their

own tank cars, but who shipped oil in barrels. This is upon the principle that other things than mere money paid by the shipper may be taken into consideration in determining whether there is a discrimination. A similar decision was made in the case of Rice against the Louisville, &c., R. R. Company (1 Interstate Commerce Reports, Co-operative Edition, p. 722, 1888).

The recent case of the Interstate Commerce Commission against the Baltimore and Ohio R. R. Co., 145 U. S., 263, is in point to show that the hands of a railroad company are not tied so that it cannot make reasonable contracts in the conduct of its business; and so long as it does not, as a matter of fact, make a discrimination in favor of any particular persons or corporations, it may make all reasonable contracts the same as an individual may.

See also to the same effect the case of *Chicago, &c., R. R. Co. vs. Iowa*, 94 U. S., 161, cited in our main brief, *Taggart Case*, p. 24; *Goodridge Case*, p. 20.

Especially may it, as in the present case, make contracts for the purchase of coal for use in its engines, and may settle a question of damages in acquiring its right of way and operating its road.

For these reasons, therefore, the Court below clearly erred in sustaining the plaintiffs' demurrer to the answer of the defendant, and in rejecting the evidence which was offered to show that there was no discrimination.

Above views and conclusions not in conflict with, but supported by the authoritative construction of the Constitution of Colorado.

The plaintiff's counsel in No. 211 says in his brief (p. 1): "Our complaint was drawn with reference to the Constitution and laws of Colorado." He then quotes Article 15, Section 6, of the Constitution of the State, which prohibits "undue or unreasonable discrimination."

So far as the constitutional provision is concerned, the Supreme Court of Colorado has decided (*Ib.* p. 191):

> "That this section is but a declaration of the common law is conceded. By this provision the elementary principles of the law of common carriers, above defined, are adopted as a part of the organic law of the State. Railway companies organized or authorized to do business within this State are subject to the law as declared by this constitutional provision. The language of the section is 'that no undue or unreasonable discrimination shall be made in charges.' By fair intendment it is clear that railway companies, under this provision, may discriminate so long as such discrimination is neither 'undue nor unjust.' While this provision remains in force it may well be doubted whether this Court or the Legislature can declare that a railway company shall not discriminate in charges at all, or that the mere inequality in rates shall constitute 'undue or unjust discrimination;' by this provision railway companies are left at liberty to regulate the rates of transportation, and are not answerable for their conduct in this respect unless their charges are unreasonable, and by undue and unjust discrimination tend to create exclusive privileges to the detriment of the shippers or the public at large."
>
> *Bayles vs. K. P. Railway Co.*, 13 Colorado, 181, 191, (1889).

The Supreme Court of Colorado in that case further held that under the Constitution mere inequality between the rate charged the shipper and the published tariff does not constitute unjust discrimination, and that a contract by a railway company to carry freight at a special rate, less than the

published shedule rate, is not void as an unjust discrimination and against public policy, in the absence of proof that such special rate is an exclusive privilege.

So this Court has also held, after great consideration, that the constitutional provision of Colorado "imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The Constitution has taken from the Legislature the power of abolishing this rule as applied to railroads." Per WAITE, C.-J., in *Atchison, Topeka, &c., R. R. Co. vs. Denver, &c., R. R. Co., 110 U. S., 667 (1883).*

Plaintiff's action is based upon section 7 of the Colorado Act of 1885, which forbids a railroad corporation from

"Charging any person a greater * * * sum than it charges any other person * * * for a like service from the same place, or upon like conditions and under similar circumstances."

The gist of the complaint is that the schedule rate which the railway company charged to persons generally, including the plaintiffs, was one dollar per ton, whereas it charged the Marshall Coal Company for like services, upon like conditions and under similar circumstances, one dollar per ton, but gave to that company a rebate, or drawback, of forty cents per ton. The company's answer to that charge was: *First*, a general denial; *second*, a special denial; *third*, a special answer above referred to setting forth the facts, showing that there was no discrimination—either in purpose or in fact—such as the plaintiffs allege. The special answer was held insufficient on demurrer, which is one of the errors relied on by the company in this Court. On the trial the com-

pany offered to prove the special facts stated in the answer. This proof, although competent under the issue raised by the denial, was excluded by the Court.

For the reasons above stated, and on the authorities cited, our first proposition is that there was here no discrimination, either at common law or under the statute, since in fact the company did not charge plaintiffs more for a like service than it charged any one else for like service, upon like conditions and under similar circumstances.

Under the answer and offered proofs the whole bottom fell out of plaintiffs' cases.

II.

As already shown, supra, Point I., there was no discrimination whatever, since the railway company received a full equivalent in value for the 40 cents per ton rebate. Our second proposition is that now, after the coal has all been carried and payments all made, and the whole transaction ended, neither the common law nor the Colorado statute gives plaintiffs any right to get a rebate, whatever might have been their rights before they made their payments.

The charge to the Marshall Company was one dollar per ton, the same as the plaintiffs paid. The plaintiffs claim that there was a concession or drawback allowed the Marshall Company, constituting, in

fact, a contract for special rates given to or made with the Marshall Company, whereby that company was entitled to and received a drawback or rebate of 40 cents per ton. Plaintiffs bring these actions to recover an amount equal to 40 cents a ton on coal shipped by them.

As above stated, we deny that in fact any rebate to the Marshall Company of 40 cents per ton was made as a gratuity or concession or without full consideration, but that the allowance to them of 40 cents per ton was an allowance for full value received, so that in point of fact the Marshall Company paid the full schedule rate. The further point we now make is that these actions, so far as grounded on the common law or the Colorado statute, must also fail.

So far as the common law is concerned, the case would be one to get a rebate to which the common law gives no right whatever.

The Colorado statute above referred to, Section 7, enacts that

> "all concessions of rates, drawbacks and contracts for special rates shall be open to and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances."

In order to give the plaintiffs a cause of action under this provision in regard to drawbacks or under Section 7, he must allege and show that the company refused to him the same or like concessions in rates and drawbacks which it allowed to the Marshall Company, and that the conditions and circumstance were the same. He did not pretend that he had asked for similar rates and drawbacks, or asked the company to make a contract

with him for special rates, similar to the one which it had made with the Marshall Company. This being a statutory action in which at the trial he did *not base his right to recover on the ground that we charged him too much, but because we charged somebody else less than we charged him*, his action must be brought within *all* the terms of the statute. Those terms simply require the company to give to the party complaining the same rates that it gives to others under like circumstances, and unless he asks for such rates and they are denied him his case is not within the statute.

This is an action to get a rebate in respect of freight already shipped and voluntarily paid for. It is brought after the freight has been shipped and the money paid. There is no ground for getting such a rebate unless it be given by the terms of the statute, and the statute, as we have seen, does not give a right of action to get a rebate in such cases, but only creates a duty on the defendant company to give, if demanded and required by the plaintiff, the same rates to him that it had given to others.

It is obvious on this statement, that on any theory, the plaintiff has no remedy at common law. On this point see the cases cited in the main brief for the plaintiff in error (Taggart case, brief, pp. 42 to 45). Same authorities in the Goodridge case, brief, pages 37 to 40.

See also *Christy vs. Missouri Pacific R. R. Co.*, 94 Mo., 453 (1887). The Missouri Constitution and Statute forbid discriminations, and yet the Supreme Court held in that case that the provisions of the Constitution and statute are "but declaratory of the common law." In that case Christie, the plaintiff, sued the company, on a contract whereby it was agreed that the plaintiff was to

ship grain of various kinds from certain stations in the West to Chicago, and that on presentation of bills for such shipments the plaintiff should pay the usual rates therefor according to the company's tariff of rates, and that the defendant should repay to the plaintiff all sums of money which the defendant should receive over and above the amount agreed upon between the parties. This suit was brought by Christie to recover from the company the difference between the amounts paid by him according to defendant's tariff of rates and the amount that was by the agreement of the parties to be paid. The defendant claimed that such a contract was in violation of the Constitution and statute of the State, and void as against public policy. But the Court held otherwise, saying:

"A common carrier has a right to contract to ship freights at a lower rate than the published tariff of rates if he chooses to do so, and such contract is not against public policy unless the privilege to ship at such rates is granted exclusively to the shipper with whom it is made or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination and renders the contract void as against public policy. No such exclusiveness or discrimination appears in the contract sued upon."

and, therefore, the plaintiff was held entitled to recover, and a judgment in his favor was affirmed.

So, in the case of *Rayles vs. Kansas Pacific Ry. Co.*, above cited, the Supreme Court of Colorado said, referring to the constitutional provision against undue or unreasonable discrimination, that a contract by a railroad company to carry freight for plaintiff at a special rate, less than its published rate, is not void, as being an unjust discrimination, or against public policy, in

the absence of evidence that such special rate is an exclusive, unreasonable privilege.

In short, to bring the plaintiff's case within the statute, which is the sole ground of his action, he must allege that the railway company refused to make to him the same concessions, or drawbacks, or special rates, that it made to the Marshall Coal Mining Company.

JOHN F. DILLON,
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For Plaintiffs in Error.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1892.

THE UNION PACIFIC RAILWAY COMPANY, *Plaintiff in Error*,

vs.

HENRY GOODRIDGE AND HIRAM MARFELL, *Defendants in Error*.

Term No. 211.

In Error to the Circuit Court of the United States for the District of Colorado.

BRIEF OF DEFENDANTS IN ERROR.

BYRON MILLETT,
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The plaintiff in error having failed to file or serve any brief or argument, as required by the rules of this court, on the defendants in error or their counsel, we submit that we are placed at a disadvantage, and ask that the judgment of the court below be affirmed.

I.

There is no error in the record of this case prejudicial to the plaintiff in error. Our complaint was drawn with reference to the constitution and laws of Colorado.

Article XV, section 6 of the constitution of that state, is as follows:

"All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employé thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power."

Session Laws of Colorado, 1885, page 309, section 7, provides as follows:

"No railroad corporation shall, without due written approval of said commissioner, charge, demand or receive from any person, company or corporation for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, charge, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances; and all concessions of rates, drawbacks and con-